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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 653.

DAVID S. STANLEY, WILLIAM R. GIBSON, SAMUEL T. CUSHING, J. C. BAILY, AND THE UNITED STATES, PLAINTIFFS IN ERROR,

VS.

MARY U. SCHWALBY AND J. A. SCHWALBY, HER HUSBAND.

IN ERROR TO COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 2, 1895.

(15943.)

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1 to 3 *Caption.*

Be it remembered that at a regular term of the honorable court of civil appeals of the fourth supreme judicial district of Texas, begun and holden in the city of San Antonio, Texas, on the 5th day of September, A. D. 1894, present, Honorable J. H. James, chief justice of said court, and Honorable W. S. Fly and Honorable H. H. Neill, associate justices, in cause No. 511, The United States vs. Mary U. Schwalby, the following proceedings were had:

4 *Caption.*

THE STATE OF TEXAS,
County of Bexar:

At a term of the district court of the forty-fifth judicial district, begun and holden at San Antonio, within and for the county of Bexar, before the Hon. W. W. King, and ending on the seventeenth day of June, A. D. 1893, the following case came on for trial, to wit:

MARY U. SCHWALBY ET AL., PLAINTIFFS, }
vs. } No. 191.
DAVID S. STANLEY ET AL., DEFENDANTS. }

5 *Plaintiffs' first amended original petition. Filed Dec. 2, 1889.*

In Bexar County district court, 45th district. To December term, 1889.

THE STATE OF TEXAS,
County of Bexar:

MARY U. SCHWALBY ET AL. }
vs. } No. 191.
DAVID S. STANLEY ET AL. }

To the Hon. District Court of said County of Bexar, 45th Judicial District:

Your petitioner, Mary U. Schwalby, who is herein joined by J. A. Schwalby, her husband, having asked and obtained leave of court to file this their first amended original petition in lieu of their original petition filed on the 23rd day of Febeuary, A. D. 1889, complaining of David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, in an action of trespass to try title, respectfully shows:

That plaintiffs reside in the county of Grimes, State of Texas; that defendants reside in said county of Bexar.

That heretofore, to wit, on the first day of February, A. D. 1889, your petitioner, Mary U. Schwalby, was lawfully seized and possessed of an undivided one-third interest in and to the certain real property hereinafter described and situated in said county of Bexar.

That petitioner, Mary U. Schwaiby, held and now holds said undivided one-third interest in said real property in fee simple, and that petitioners are entitled to possession to the whole of said property.

That afterward, to wit, on the 2nd day of February, A. D. 1889, defendants, without any right or title to any portion of said property, unlawfully entered upon and dispossessed petitioners of said premises and withhold from them the possession thereof.

That the premises so entered upon and unlawfully withheld from petitioners are described thus: "All that certain tract or parcel of land situate, lying, and being in the city of San Antonio, in the county of Bexar and State of Texas, described as follows, to wit: Lot number one (1),
6 in block number two (2), being a subdivision of original lot number one in range number four, in district number one of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Freisleben, city surveyor of said city; said lot has a front of thirty-two varas on Grayson street and a depth of ninety varas.

Defendants being in court by process and answers duly filed, plaintiffs pray judgment for the recovery of the title to one-third of said premises and possession of the whole thereof, for costs of suit and for general relief.

GEO. C. ALTGELT,
Attorney for Plaintiffs.

(Filed December 2, 1889. Geo. R. Dashiell, clk. D. C. Bexar Co.)

Plaintiffs' first supplemental petition. Filed Dec. 2, 1889.

In Bexar County district court, December term, 1889, 45th judicial district of Texas.

MARY U. SCHWALBY ET AL.
vs. } No. 191.
DAVID S. STANLEY ET AL.

Now come the plaintiffs, Mary U. Schwalby and J. A. Schwalby, her husband, and with leave of the court had and obtained, file this their first supplemental petition.

Thereupon plaintiffs except to the answer filed in this suit by J. G. Ballance, esq., and A. J. Evans, esq., U. S. attorney, western district of Texas, in so far as the same is filed by said attorney for and in behalf of the United States of America, because they say:

1st. The said United States of America are not a party defendant to this suit, and that neither of said attorneys nor the Attorney-General of the United States has authority to submit for adjudication in the courts of the State of Texas the rights of said United States of America.

2nd. This court has not jurisdiction to determine the controversy
7 and issues attempted to be pleaded by said officers in behalf of the United States of America, but that the same are cognizable exclusively in the courts of the United States.

3rd. That the matters pleaded by the said United States of America as an estoppel against plaintiffs are insufficient in law because the facts stated do not constitute an estoppel.

4th. That the matters pleaded by said United States of America under their several pleas of the statute of limitations of ten, five, and three years constitute no defense to plaintiffs' action because they say the United States of America are neither bound by nor protected by the statutes of limitations of the State of Texas; and because plaintiffs could not in any court bring suit against said United States.

5th. That the suggestion of improvements alleged to have been made in good faith by the United States of America upon the land in controversy is insufficient in law because the grounds of said claim are not stated.

6th. Plaintiffs except to the sufficiency of all that portion of the answer of the United States of America alleging an innocent purchase from the city of San Antonio by the United States aforesaid, because it does not appear therefrom that the consideration of said purchase was for a valuable consideration.

Plaintiffs pray the judgment of the court upon the sufficiency of said answer in so far as the same is filed for the United States of America, and that the same may be stricken out, for costs, &c.,

GEO. C. ALTGELT,
Attorney for Plaintiffs, Mary U. Schwalby et al.

The plaintiffs, by way of replication to defendants' said answer, say that they deny all and singular the allegations therein contained.

Plaintiffs further show that the plaintiff Mary U. Schwalby is now and ever since the 18th day of January, 1871, was a married woman, and the wife of her coplaintiff J. A. Schwalby.

Plaintiffs aver that on said 18th day of January, A. D. 1871, and long prior to the time that defendants' adverse possession first commenced, the said Mary U. Schwalby was lawfully married to J. A. Schwalby, her husband and coplaintiff, and ever since that time continued to be a married woman as aforesaid.

8 Wherefore plaintiffs say that defendants' pleas of the statutes of limitation ought not to avail them.

Plaintiffs pray judgment, &c.

GEO. C. ALTGELT,
Attorney for Plaintiffs.

(Filed December 2, 1889. Geo. R. Dashiell, clk. D. C., Bexar Co.)

Original petition of Jos. Spence, jr., intervenor. Filed Dec. 2, 1889.

In Bexar County district court, December term, 1889. 45th judicial district of Texas.

THE STATE OF TEXAS,
County of Bexar:

MARY U. SCHWALBY
vs.
DAVID S. STANLEY ET AL.

To the Hon. District Court of said County of Bexar, 45th Judicial District:

And now comes Joseph Spence, jr., and with the leave of the court in this behalf had and obtained, files this his original petition in intervention in this suit.

And thereupon complaining of defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, but not resisting the relief prayed for by plaintiff Mary U. Schwalby, intervenor shows:

That he resides in Tom Green County, Texas.

That all of said defendants reside in Bexar County, Texas.

That your petitioner is the owner in fee of one undivided one-third interest in and to the land and tenements in controversy in this suit and described in plaintiffs' petition aforesaid.

That heretofore, to wit, on the 26th day of March, A. D. 1889, petitioner became and was lawfully seized and possessed of said undivided one-third interest of said real property, holding the same in fee simple, and was entitled to the possession of the whole of said property as against said defendants.

That afterwards, to wit, on the 27th day of March, A. D. 1889, said
defendants, without any right or title to any portion of said
9 premises, unlawfully *without any right or title to any portion of said*
premises, unlawfully entered upon and dispossessed petitioner of said
premises, and withhold from him the possession thereof.

That the said premises so unlawfully entered upon by defendants and withheld from petitioner are described as follows, to wit:

"All that certain tract or parcel of land situate, lying, and being in the city of San Antonio, in the county of Bexar, and State of Texas, described as follows, to wit: Lot number one (1) in block number two (2), being a subdivision of original lot number one in range number four (4), in district number one (1) of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Friesleben, city surveyor of said city. Said lot has a front of thirty-two varas on Grayson street and a depth of ninety (90) varas.

Defendants being in court by answers and process, intervenor prays judgment for the recovery of the title to one-third interest in said premises, and for possession of the whole of said premises as against defendants, but jointly with plaintiff, for costs of suits and general relief.

GEO. C. ALTGELT,
Attorney for Intervenor Jos. Spence, jr.

(Filed December 2, 1889. Geo. R. Dashiell, clk. D. C., Bexar Co.)

Order transferring cause.

MONDAY, *November* 18, A. D. 1889.

MARY A. SCHWALBY
vs. } No. 4053.
D. S. STANLEY ET AL.

It is ordered by the court that the above and foregoing numbered and styled causes be transferred, and the same are hereby transferred to the district court of the Forty-fifth judicial district of Texas.

10 *Defendants' second amended original answer, filed June* 7, 1893.

In the district court of Bexar County, Texas, 45th judicial district of Texas.

MARY U. SCHWALBY ET AL.
vs. } No. 4053/191.
DAVID S. STANLEY ET AL.

Now come the defendants, David S. Stankey, William R. Gibson, Samuel T. Cushing, and Doctor J. C. Bailey, and with them comes also the United States of America by their attorney, Andrew J. Evans, who is United States attorney for the western district of Texas, duly appointed and commissioned as such, and who so appears for the said United States of America by the direction of the Attorney-General of the United States of America, and here exhibits and makes manifest his direction and instruction to so appear and act in these premises, by producing and attaching hereto as part hereof of two genuine letters, to wit:

1. Copy of letter marked Exhibit A, from Redfield Proctor, Secretary of War, to the Attorney-General, of date April 18th, 1889.

2. Letter from the Attorney-General of the United States of America in response to letter Exhibit A, here made Exhibit B, to Rudolph Kleberg, then U. S. attorney, western district of Texas, and the predecessor in office of the said A. J. Evans, dated April 20th, 1889. That said letters, Exhibits A and B, are genuine and impose official duties, and that A. J. Evans is the successor in office of said Kleberg named in said letters and authorized and bound to act under the same, and the said David S. Stanley, William R. Gibson, Samuel T. Cushing, and Doctor J. C. Bailey, and the United States of America appearing as above, with due respect move the court for leave to amend their pleadings in this cause as follows, to wit:

1. First, to amend and abandon their "Defendants' original answer" filed herein March 8th, 1889.

2. Second, to amend and abandon "Defendants' first amended answer" filed herein October 4, 1889.

3. Third, to amend and abandon "Defendants' first trial amendment" filed herein March 7th, 1890.

11 4. Fourth, to amend and abandon "Defendants' second trial amendment" filed herein March 7th, 1890, and to file this "Defendants' second amended original answer" in lieu of and to take the place of said aforesaid "Defendants' original answer," and "Defendants' first amended answer," and "Defendants' first and second trial amendments" aforesaid, and, said leave being granted, say:

1st. The defendants the United States of America and David S. Stanley, and William R. Gibson, and Samuel C. Cushing, and Doctor J. C. Bailey, by A. J. Evans, their attorney, and by A. J Evans, United States attorney by direction of the Attorney-General, as hereinbefore exhibited to the court, come and defend the wrong, trespass, injury, and damages complained of by the plaintiffs, and say that the plaintiffs ought not to have or maintain their aforesaid action against the defendants, because they say:

1st. This is an action at law in this court nominally against D. S. Stanley, S. C. Cushing, W. R. Gibson and Bail'y, but in fact against the United

States of America, a sovereign corporation not liable to suit in this court or any other in the absence of an act of Congress.

A. J. EVANS,
U. S. Attorney, Western District, Texas.

I, Andrew J. Evans, do solemnly swear that the above plea in bar number one is true and correct.

A. J. EVANS,
U. S. Attorney, Western District, Texas.

Sworn to and subscribed before me this 7th day of June, A. D. 1893.

HY. UMSCHEID,
Cl'k D. C., Bex. Co.
By JOS. UMSCHEID, *Deputy.*

2. This is an action at law against the property of the United States of America, a sovereign corporation not liable to suit in this court or in any other in the absence of an act of Congress, and in support of this plea the United States of America, by their attorney, A. J. Evans, United States attorney for the western district of Texas by direction of the Attorney-General of U. S., exhibits to the court their title to the said lot No. one (1), block number two (2), being a subdivision of original lot number 12 one (1), in range number four (4), in district number one of the city of San Antonio, sued for in plaintiffs' petition, to wit:

I. Agreement on file, date March 7th, 1890, agreeing that A. M. Dignowity, deceased, is the common source of title through whom the plaintiffs and the defendant the United States of America claim the lot, filed in this case March 7, 1891.

II. Death and will of said A. M. Dignowity, with power in A. J. Dignowity to sell, filed herein March 7th, 1890.

III. Deed from A. J. Dignowity, executor of A. M. Dignowity (copy), dated 23rd of April, 1875, filed herein March 7th, 1891, to city of San Antonio.

IV. Deed from city of San Antonio to the defendant the United States of Texas, dated 16th day of June, A. D. 1875, and possession thereunder by the United States of America by her army, soldiers, and officers, for fourteen years.

In connection with this plea in bar, and plea number one in bar, the defendants say that the whole record in this case, the rulings of this court and the supreme court of Texas and the Supreme Court of the United States demonstrate the fact to be, and such is the truth, and is here set up, that at the filing of this suit, and ever since, and now, the defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and Doctor J. C. Baily, sued in this case, were officers in the military service of the United States of America, in possession as such of the lot number one, Block No. 2, sued for by plaintiffs, under and by direction of the President of the United States of America, the Commander-in-Chief of the Army and Navy of the United States, and not of their own volition, will, or wish, and that neither the said David S. Stanley, nor the said William R. Gibson, Samuel T. Cushing, or Doctor J. C. Baily ever pretended to hold or have possession in themselves individually of the lot sued for by plaintiffs, or to have, as individuals, any right of possession of said lot, and that they, nor either of them, ever pretended to have or to hold title, or color of title, to the said lot number one, Block No. 2, and that this suit and these proceedings are but a palpable device to maintain an action at law against the United States of America and their property, and should not be further maintained; and of these their pleas in bar, numbers one and two, 13 defendants pray judgment of the court, and that they be dismissed hence with their costs.

A. J. EVANS,
U. S. District Attorney and Attorney for Defendants.

3. And for further pleading in bar the said United States of America by her attorney, A. J. Evans, United States attorney, by direction of the Attorney-General, and David S. Stanley, William R. Gibson, Samuel T. Cushing, and Doctor J. C. Bailey say that plaintiffs ought not to further maintain this action, because their said action, as appears from their pleading, is an action in personam and in *Sem*, and this court has no jurisdiction over the locos in quo or the land sued for, for that on the 3rd day of March, A. D. 1881, the then governor of Texas, pursuant to title 15, revised civil statutes of the State of Texas, ceded to the United States of America exclusive jurisdiction over a large military reservation near San Antonio, Texas, including the lot and lands sued for in this action, by proclamation of that date. A true copy of said proclamation is hereto attached, marked Exhibit A and made part hereof, which proclamation at the filing of this suit and now is of full force and effect, and deprives this court of any right or power to make any judgment, onder, or decree affecting the land sued for in this case or the possession thereof; wherefore defendants pray to be dismissed hence with their costs.

A. J. EVANS,
United States Attorney and Attorney for the United States of America.

Proclamation.

STATE OF TEXAS,
County of Travis:

Be it known by these presents that whereas by and bearing date June 30th, 1878, the city of San Antonio, in said State of Texas, acting by and through James H. French, the mayor thereof, executed its certain deed of conveyance to the Government of the United States to the three parcels of land hereinafter described and set forth by metes and bounds, giving and granting to the said United States said lands for military and 14 other public uses, and whereas said United States Government desires to acquire constitutional jurisdiction over such lands for said purposes, and has made written application to me for that purpose through its duly authorized officer, C. C. Augur, brigadier-general, U. S. Army, commanding the department of Texas, said application being accompanied with the proper evidence of said conveyance, duly authenticate' and recorded, containing an accurate description by metes and bounds of said lands: "Now, therefore, I, O. M. Roberts, governor of the State of Texas, in consideration of the premises, in the name and behalf of the State of Texas, under and by virtue of Title XV, revised civil statutes of the State of Texas, do by these presents cede to the United

States of America, a sovereign corporation not liable to suit in this court or any other in the absence of an act of Congress.

A. J. EVANS,
U. S. Attorney, Western District, Texas.

I, Andrew J. Evans, do solemnly swear that the above plea in bar number one is true and correct.

A. J. EVANS,
U. S. Attorney, Western District, Texas.

Sworn to and subscribed before me this 7th day of June, A. D. 1893.

HY. UMSCHEID,
Cl'k D. C., Bex. Co.
By JOS. UMSCHEID, *Deputy.*

2. This is an action at law against the property of the United States of America, a sovereign corporation not liable to suit in this court or in any other in the absence of an act of Congress, and in support of this plea the United States of America, by their attorney, A. J. Evans, United States attorney for the western district of Texas by direction of the Attorney-General of U. S., exhibits to the court their title to the said lot No. one (1), block number two (2), being a subdivision of original lot number
12 one (1), in range number four (4), in district number one of the city of San Antonio, sued for in plaintiffs' petition, to wit:

I. Agreement on file, date March 7th, 1890, agreeing that A. M. Dignowity, deceased, is the common source of title through whom the plaintiffs and the defendant the United States of America claim the lot, filed in this case March 7, 1891.

II. Death and will of said A. M. Dignowity, with power in A. J. Dignowity to sell, filed herein March 7th, 1890.

III. Deed from A. J. Dignowity, executor of A. M. Dignowity (copy), dated 23rd of April, 1875, filed herein March 7th, 1891, to city of San Antonio.

IV. Deed from city of San Antonio to the defendant the United States of Texas, dated 16th day of June, A. D. 1875, and possession thereunder by the United States of America by her army, soldiers, and officers, for fourteen years.

In connection with this plea in bar, and plea number one in bar, the defendants say that the whole record in this case, the rulings of this court and the supreme court of Texas and the Supreme Court of the United States demonstrate the fact to be, and such is the truth, and is here set up, that at the filing of this suit, and ever since, and now, the defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and Doctor J. C. Baily, sued in this case, were officers in the military service of the United States of America, in possession as such of the lot number one, Block No. 2, sued for by plaintiffs, under and by direction of the President of the United States of America, the Commander-in-Chief of the Army and Navy of the United States, and not of their own volition, will, or wish, and that neither the said David S. Stanley, nor the said William R. Gibson, Samuel T. Cushing, or Doctor J. C. Baily ever pretended to hold or have possession in themselves individually of the lot sued for by plaintiffs, or to have, as individuals, any right of possession of said lot, and that they,

nor either of them, ever pretended to have or to hold title, or color of title, to the said lot number one, Block No. 2, and that this suit and these proceedings are but a palpable device to maintain an action at law against the United States of America and their property, and should not be further maintained; and of these their pleas in bar, numbers one and two,
13 defendants pray judgment of the court, and that they be dismissed hence with their costs.

A. J. Evans,
U. S. District Attorney and Attorney for Defendants.

3. And for further pleading in bar the said United States of America by her attorney, A. J. Evans, United States attorney, by direction of the Attorney-General, and David S. Stanley, William R. Gibson, Samuel T. Cushing, and Doctor J. C. Bailey say that plaintiffs ought not to further maintain this action, because their said action, as appears from their pleading, is an action in personam and in *Sem*, and this court has no jurisdiction over the locos in quo or the land sued for, for that on the 3rd day of March, A. D. 1881, the then governor of Texas, pursuant to title 15, revised civil statutes of the State of Texas, ceded to the United States of America exclusive jurisdiction over a large military reservation near San Antonio, Texas, including the lot and lands sued for in this action, by proclamation of that date. A true copy of said proclamation is hereto attached, marked Exhibit A and made part hereof, which proclamation at the filing of this suit and now is of full force and effect, and deprives this court of any right or power to make any judgment, onder, or decree affecting the land sued for in this case or the possession thereof; wherefore defendants pray to be dismissed hence with their costs.

A. J. Evans,
United States Attorney and Attorney for the United States of America.

Proclamation.

State of Texas,
County of Travis:

Be it known by these presents that whereas by and bearing date June 30th, 1878, the city of San Antonio, in said State of Texas, acting by and through James H. French, the mayor thereof, executed its certain deed of conveyance to the Government of the United States to the three parcels of land hereinafter described and set forth by metes and bounds, giving and granting to the said United States said lands for military and
14 other public uses, and whereas said United States Government desires to acquire constitutional jurisdiction over such lands for said purposes, and has made written application to me for that purpose through its duly authorized officer, C. C. Augur, brigadier-general, U. S. Army, commanding the department of Texas, said application being accompanied with the proper evidence of said conveyance, duly authenticate' and recorded, containing an accurate description by metes and bounds of said lands: "Now, therefore, I, O. M. Roberts, governor of the State of Texas, in consideration of the premises, in the name and behalf of the State of Texas, under and by virtue of Title XV, revised civil statutes of the State of Texas, do by these presents cede to the United

States of America exclusive jurisdiction over the three parcels of land above referred to, the same being described in a body minutely as follows: Beginning at Alamo Ditch, a square cut stone, marked U. S., is set on line three and three-quarters varas east of ditch, from which stone a pecan two feet in diameter bears S. $47\frac{1}{8}$° W. distant $18\frac{1}{2}$ vrs., another pecan 30 in. dia. bears N. 46° E. distant 15 varas. Thence east with a variation of 9° 30′ east four hundred and sixty-one and one-third ($461\frac{1}{3}$) varas, making $465\frac{8}{100}$ varas from ditch, to a stone marked U. S. set for corner. Thence south two hundred and ten varas to a stone marked U. S. for corner. Thence east two hundred and forty-four (244) varas to a stone marked U. S. set for corner. Thence north two hundred and ten varas to a stone marked U. S. set for corner, from which an elm 15 in. dia. bears N. 21° W. distant $202\frac{14}{100}$ varas, and the lightning rod on tower of depot buildings bears S. $86\frac{1}{3}$° E., and the NW. corner of said buildings bears N. $82\frac{7}{8}$° E. Thence E. (519) five hundred and nineteen varas to a stone marked U. S. set for corner, from which the NW. corner of depot building bears N. 27° 10′ E. distant 79 varas, and the SW. corner of same building bears S. $14\frac{1}{2}$° E. distant $158\frac{1}{2}$ varas. Thence south one hundred and ninety-two varas (192) to a stone marked U. S. set for corner, from which the SW. corner of depot building bears N. 45° E. distant 53 varas, the SE. corner of same building bears N. 81° 50′ east, and the NW. corner of same building bears N. 8° east. Thence east three hundred varas (300) to a stone marked U. S. set for the SE. corner of the tract 15 conveyed, from which the SE. corner of depot buildings bears N. 44° 41′ W. distant $52\frac{7}{8}$ varas, the NE. corner of same building bears north $8\frac{1}{8}$° west, and the SW. corner of same building bears N. $81\frac{3}{4}$° W. Thence N. four hundred and ninety-two (492) varas to a stone marked U. S. set for the NE. corner of the tract, from which the NE. corner of the depot buildings bears S. 9° 18′ west distant $232\frac{1}{2}$ varas, and the NW. corner of said building bears S. $48\frac{3}{4}$° W. Thence S. 89° 55′ W. fourteen hundred and fifty varas to Alamo Ditch, a stone marked U. S. is set on line four varas from ditch, from which stone a hackberry 24 inches diam. bears N. $26\frac{1}{2}$° W. distant 10 varas; another 24 inches diam. bears S. $67\frac{1}{5}$ E., distant $16\frac{2}{10}$ vrs. Thence down the ditch with its meanders to the place of beginning, containing ninety-two and $\frac{79}{100}$ acres, more or less, in district one and two. Upon the condition, nevertheless, that the said State of Texas shall retain concurrent jurisdiction with the United States over the above described lands and every portion thereof, so far that all process, civil or criminal, issuing under the authority of said State or any of the courts or judicial officers thereof may be executed by the proper officers of said State upon any person amenable to same within the limits of the above described and ceded land, in like manner and with like effect as if no such cession had taken place. In witness whereof I have hereunto set my hand and caused the great seal of State to be affixed, this the 3rd day of March, A. D. 1881.

[SEAL.] O. M. ROBERTS, *Governor.*

By the governor.

H. L. SPAIN, *Acting Secy. of State.*

THE STATE OF TEXAS,
Bexar County:

I, Thad W. Smith, county clerk of said county, do hereby certify that the foregoing instrument of writing was filed for registration in my office on the 7th day of June, A. D. 1883, at 5 o'clock p. m., and duly recorded on the 16th day of June, A. D. 1883, at $10\frac{3}{4}$ o'clock p. m., in the records of said county in book volume 27, on pages Nos. 608 and 609.

In testimony whereof witness my hand and official seal at office this 16th day June, A. D. 1883

[SEAL.]
THAD W. SMITH,
County Clerk, Bexar Co., State of Texas.
16 By CHAS. M. ROBERTS, *Deputy.*

THE STATE OF TEXAS,
County of Bexar:

I, Thad W. Smith, county clerk of said county, do hereby certify that the above and foregoing $3\frac{1}{8}$ pages of transcript contain a true and correct copy of the original as the same appears of record in my office in book volume No. 27, on pages No. 608 and 609.

Witness my hand and official seal at office in San Antonio, Texas, this the 12th day of May, A. D. 1891.

[L. S.]
THAD W. SMITH,
Co. Clk., Bex. Co., Texas.
By JOHN STAPPENBECK, *Deputy.*

And said defendants The United States of America appearing by Andrew J. Evans, United States attorney for the western district of Texas by direction of the Attorney-General of the United States, as contained in letter Exhibit B, and no further, and the said David S. Stanley, William R. Gibson, and Samuel T. Cushing, and Doctor J. C. Baily, and protesting against the overruling of their three several pleas in bar filed in this case on June —, 1893, and answering only under protest, and to prevent judgment for want of plea, say:

1st. That at the filing of this suit and ever since, and now, they were and are officers of the Army of the United States of America, and the lot of land sued for in this cause by plaintiffs was for the same time a part of a military reservation of the United States of America, duly acquired by the said United States of America under the Constitution and laws of the United States and the constitution and laws of the State of Texas; that at the filing of this suit and service upon them and ever since they were as officers and soldiers of the United States of America, along with many other soldiers and officers, temporarily occupying in part the said
military reservation near San Antonio, Texas, including the lot
17 sued for in this action under and by virtue of the orders and com-
mands of the Commander-in-Chief of the armies of the United States of America and not by their own volition, wish, or will; and further, that at the commencement of this suit, before or since, they have never held in themselves, as individuals, any right or title or claim to the lot and premises sued for by plaintiffs in this suit; and further, at the commencement of this suit, before or since, they as individuals have never set up or held, or desired to hold, any right of possession to the premises

sued for, and that they as individuals have never in any form or manner in fact trespassed or committed any tort upon the rights of plaintiffs, and all their acts and doings concerning said lot number one (1) was as set forth, under the orders and command of their Government, the United States of America, and if in law their acts concerning said premises sued for make them tenants under the United States then they as such tenants only by law; and of these facts they pray a verdict of a jury and their dismissal and costs.

A. J. Evans,
Attorney for Defendants.

And further defendants under protest against pleading at all say that on the 16th day of June, A. D. 1875, the defendant, the United States of America, acquired the title and right of possession to the premises set out in plaintiffs' petition and instantly went into actual possession thereof with her army and soldiers and commenced to improve and beautify the same as a part of her military headquarters in the State of Texas, and from thence until now have actually occupied the said lands and premises, and have beautified and improved said premises, building houses, barracks, storehouses, stables, etc., of great value, say of the value of (\$100,000$\frac{00}{100}$) one hundred thousand dollars, and during all of such time, to wit, from the said 16th day of June, A. D. 1875, to the time of filing this suit, the plaintiffs in this suit and those under whom they hold, stood by and witnessed the improvements and expenditures by defendant put upon said lands and premises without giving any notice of their claim or title thereto, and now for the first time set up their claim. Wherefore defendants claim
that plaintiffs by their laches have estopped themselves and are
18 estopped from the assertion of their title or claim if any they
ever had.

And specially pleading the defendants say that since June 16th, 1875, and until the filing of this suit, to wit, February 23rd, 1889, the defendant, the United States of America, has been in the actual use and possession of all the premises herein described, using, cultivating, and enjoying the same, there being no taxes due thereon, and here interposes their plea of ten (10) years' limitation.

And that the defendant, the United States of America, has had the actual and adverse possession of the said premises set out in plaintiffs' petition, cultivating, using, and enjoying the same, no taxes thereon being due, under deeds duly recorded for more than five years next preceding the filing of this suit, and here interposes her plea of the statute of limitation of five (5) years.

And specially pleading, defendants say that the defendant, United States of America, have had the actual, peaceable, adverse possession of the premises set out in plaintiffs' petition, using, cultivating, and enjoying the same and no taxes being due thereon under title and color of title from and under the sovereignty of the soil down to the defendant, the United States of America, duly registered and here interposes their plea of the three (3) years' statute of limitation.

And of all these pleas put themselves upon the country.

(Signed) A. J. Evans,
United States Attorney and Attorney for the Defendants.

And further pleading, the defendants say that the defendant, the United States of America, has had adverse possession in good faith, under title duly recorded, of the premises in controversy in this case, to wit: Lot number one (1), in block number two (2), aforesaid, in the city of San Antonio, Texas, for at least one (1) year next before the 23rd day of February, 1887, the date of this suit, and that the United States have made valuable and permanent improvements on said land, as follows, to wit: Has erected on said premises during the time they have been in possession, as follows: two wooden houses, value five hundred dollars ($500) each; one servant's house, value three hundred dollars ($300); three hundred and seventy (370) feet of fence, value fifty cents ($.50) per foot,
19 one hundred and eighty-five dollars (185\frac{00}{100}$); one shed, value
two hundred and fifty dollars ($250); one other shed, value one hundred dollars ($100). And further pleading, the defendant, the United States of America, says that in 1875 they were in need of ground for a military reservation, and in good faith and without any notice whatever of any adverse claim or title or right of possession, take from the city of San Antonio, Texas, a warranty deed to the premises in controversy in this suit. And this they did after a careful examination of the county records of Bexar County, Texas, and finding no adverse claim or title thereto on record; that when the United States made the improvements above set out, they, by their agents, employes, and servants, had no knowledge whatever from any source, or suspicion that any adverse title to that by the city of San Antonio existed in any one against said city; that her attorney carefully examined the records for her, as is usual in such cases under the law, and found no adverse title.

(Signed) A. J. EVANS,
Attorney for the United States and for the Defendants.

And further pleading, under protest, defendants specifically deny the commission of any of the wrongs, trespasses, and injuries complained of in plaintiffs' complaint, and to all such enter the plea of not guilty.

A. J. EVANS,
Attorney for the United States and for Defendants.

And further pleading, under protest, the United States say that they are innocent purchasers, for a valuable consideration, of the lands sued for, without notice of plaintiffs' unrecorded claim.

A. J. EVANS,
Attorney for United States of America.

EXHIBIT A.

[Subject, suit for land, San Antonio, Tex. Copy. $\frac{1420}{C}$ M. B. M.]

WAR DEPARTMENT,
20 *Washington City, April* 18, 1889.

SIR: I have the honor to inclose a letter of the 28th ultimo from the judge-advocate, Department of Texas, in regard to the suit instituted by Mary N. Schwalby et al., against General David S. Stanley, United States Army, et al., to recover possession of lot 1, block 2, range 4, District

I, which is a part of the military reservation of San Antonio, Texas, and to request that the proper United States attorney be instructed to appear and defend the interests of the United States in this matter.

I also inclose the following papers: Abstract of title; plat of original Lot I; deed from the city of San Antonio to the United States, dated June 16, 1875; deed from the city of San Antonio to the United States, dated June 30, 1878; opinion of the Attorney-General, dated October 5, 1875.

Very respectfully,

REDFIELD PROCTOR,
Secretary of War.

The Honorable the ATTORNEY-GENERAL.

(1420–C, and its 2 inclos. & Inclos. 1 & 2 of 7140–W. D. 1875, & 8012–W. D. 1875, herewith.)

EXHIBIT B.

F. 3550–'89.]

DEPARTMENT OF JUSTICE,
Washington, April 20, 1889.

RUDOLPH KLEBERG, Esq.,
U. S. Attorney, Cuero, Texas.

SIR: I herewith transmit a copy of a letter received from the Secretary of War, dated the 18th instant, together with its enclosures, in relation to a suit brought to recover possession of part of the military reservation at San Antonio, Texas. In compliance with his request you are hereby
21 instructed to appear and defend the interests of the United States involved therein.

I am, sir, very respectfully,

W. H. H. MILLER,
Attorney-General.

(Filed June 7, 1893. Henry Umscheid, clk. D. C., Bexar Co. By Jos. Umscheid, deputy.)

Mandate from supreme court of Texas. Filed June 12, 1893.

The State of Texas to the district court of Bexar County, greeting:

Before our supreme court on the 6th day of April, A. D. 1893, in the cause David S. Stanley et al., appellants, vs. Mary U. Schwalby et al., appellees, Mo. No. 3, our said supreme court made its order in these words:

"In the above cause the Supreme Court of the United States having on the 6th day of February, 1893, reversed the judgment rendered by this court and remanded said cause, in order that further proceedings may be had therein not inconsistent with the opinion of said Supreme Court of the United States, and appellee' having presented to this court the mandate of said court, together with a certified copy of the opinion therein delivered, and moved this court that a mandate issue in conformity with the mandate of said Supreme Court of the United States, and said motion having been considered in connection with said mandate and opinion, it is considered, adjudged, and ordered that said motion be granted; that the judgment heretofore rendered by this court in this cause on the 4th day of March, 1892, be vacated and set aside, and the mandate issued thereon be recalled, and the judgment of the court below be reversed and the cause remanded for further proceedings not inconsistent with the opinion of the Supreme Court of the United States, and a copy of said opinion, certified by the clerk of said court, is hereby ordered to be attached to the mandate of this court when issued. It is further ordered 22 that the appellees in this court, Mary U. Schwalby, J. A. Schwalby, and Joseph Spence, jr., pay all costs in this court in this behalf expended, and this decision be certified below for observance."

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed, and executed.

Witness the Hon. John W. Stayton, chief justice of our said supreme court, with the seal thereof annexed, at the city of Austin, this the 15th day of April, A. D. 1893.

[SEAL.]
CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

(Endorsed:) Mandate supreme court, Austin. David S. Stanley et al., vs. Mary U. Schwalby et al. Issued April 15th, 1893. Chas. S. Morse, clerk, by F. T. Connerly, deputy.

Supreme Court of the United States. No. 1092. October term, 1892.

DAVID S. STANLEY, W. R. GIBSON, S. T. CUSHING, J. C. Baily, and the United States of America, plaintiffs in error,
vs.
MARY U. SCHWALBY, J. A. SCHWALBY, AND Joseph Spence, jr.

In error to the supreme court of the State of Texas.

[February 6, 1893.]

This was an action of trespass to try title, brought February 23, 1889, in the district court of Bexar County, Texas, against David S. Stanley and three other defendants, by Mary U. Schwalby, whose husband, J. A. Schwalby, was afterwards made a party plaintiff, to recover a certain parcel or lot of land in the city of San Antonio. Mrs. Schwalby claimed title to one-third of the lot, as one of the three heirs of her father, Duncan B. McMillan, deceased; and subsequently, one Joseph Spence, jr., intervened and asserted title to one-third of the lot through a con- 23 veyance made to him by Duncan W. McMillan, another of said heirs. Judgment of possession of the whole lot was prayed, upon an averment that defendants entered without right or title.

The land in question was part of a military reservation of the United States, and was used and occupied as a military post, and David S. Stanley and his codefendants were officers of the Army of the United States, holding and occupying the land under authority of the United States. They pleaded not guilty, and specially that they held lawful possession of the property as officers and agents of the United States, which had had title and right of possession, under conveyance duly recorded, since the year 1875, as innocent purchasers for value without notice; and also the three-year, five-year, and ten year statutes of limitation of Texas; and a claim for allowance for permanent and valuable improvements.

The United States district attorney appeared for the United States, acting, as he alleged, "by and through instructions from the Attorney-General of the United States," and joined on behalf of the United States in the pleas of the other defendants.

The district court being of opinion that the United States could not set up the statute of limitations, whether for three, five, or ten years, or otherwise, the pleas of the United States to that effect were ordered to be stricken out.

On the trial evidence was adduced on both sides bearing upon the title and the purchase of the property by the United States and the value of the improvements. It appeared that one Dignowity was the common source of title, and had executed a statutory warranty deed of the lot in controversy to Duncan B. McMillan, dated and acknowledged May 9, 1860, but not recorded until September 30, 1889; that McMillan, then a widower, died February 5, 1865, leaving three children him surviving, of whom plaintiff, Mary U., was born September 11, 1849, and married J. A. Schwalby January 18, 1871; and Duncan W. was born November 2, 1850, and conveyed to Joseph Spence, jr., the intervenor, March 26, 1889, by deed acknowledged that day and filed for record March 29, 1889.

Dignowity died in April, 1875, testate, and by the terms of his will, which was duly probated that month, his property passed to his widow,
who, on May 1, 1875, in her own right, and as independent exec-
24 utrix of her husband's will, released and quitclaimed to the city
of San Antonio all her right, title, and interest in the lot in question, "known as the McMillan lot," with covenant of warranty against any person claiming by, under, or through Dignowity or his estate. The city of San Antonio conveyed this and three other lots by warranty deed, dated June 16, 1875, and recorded October 21, 1875, to the United States for military purposes.

General Stanley testified that he was a brigadier-general of the United States Army, that his codefendants were officers of the same, and that they took and held possession as such officers.

It was contended that the evidence tended to show that the city and the United States took with notice of a previous sale to McMillan; that McMillan had never paid the purchase price in full; that the unrecorded deed was never delivered to McMillan, but held in escrow; and that Dignowity paid the taxes on the lot from 1860 to 1875.

The district court gave judgment in favor of the plaintiffs, Schwalby and Spence, that each had title to one-third of the lot and for the possession of the whole, and also in favor of the United States for $1,521 for the improvements, that being the difference between the value thereof and the amount found due from the United States for the use and occupation of the premises. Both parties excepted to the judgment and perfected an appeal therefrom. The supreme court of Texas reversed the judgment, and rendered judgment dismissing the action as to the United States; that plaintiffs recover from the defendants Stanley and others, possession of the lot in question and the sum of two hundred dollars, being the value of the use and occupation of said land, together with costs; to review which judgment this writ of error was sued out. The opinion is reported, in advance of the official series, in 19 S. W. Rep., 264.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In the Siren (7 Wall., 152), Mr. Justice Field, who spoke for the court, in adverting to the familiar rule of the common law that the sovereign can not be sued in his own courts without his consent, and the ground
upon which the rule rested, said: "This doctrine of the common
25 law is equally applicable to the supreme authority of the nation, the
United States. They can not be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in United States v. Clarke, 8 Pet., 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the Government directly and suits against its property."

If then this suit had been directly against the United States or the property of the United States, it could not have been maintained, and it is only upon the proposition that it was brought not against the United States, but against the officers of the United States as individuals, although holding possession of the property under their authority and as belonging to them, that it proceeded to judgment. The district attorney of the United States acting, as he alleged, "by and through instructions from the Attorney-General of the United States," filed certain pleas on behalf of the United States, among others, of limitation, and for allowance for valuable improvements. No question seems to have arisen in the State district court as to the authority of the district attorney to do this. The court ruled that the United States could not plead the statutes of limitation, and therefore struck those pleas out, but sustained the plea claiming an allowance for improvements, and rendered judgment in favor of the United States for the value thereof. The supreme court of Texas held that as the instructions of the Attorney-General were not found in the record and no act of Congress empowering him to make the United States a party, either plaintiff or defendant, to an action in a State court, was referred to, the United States could not be regarded as a party, and therefore reversed the judgment below and rendered judgment dismissing the United States from the case. The error assigned to this action of the supreme court has not been pressed by counsel for the Government, and we are not called upon to express any opinion upon it. We should remark, however, that from a very early period it has been held that even where the United States is not made technically a party under the authority of an act of Congress,
yet where the property of the Government is concerned it is proper
26 for the attorney for United States to intervene by way of suggestion,
and in such case if the suit be not stayed altogether, the court will adjust its judgment according to the rights disclosed on the part of the Government thus intervening. Such was the leading case of The Exchange (7 Cranch, 116, 147), where the public armed vessel of a foreign sovereign having been libelled in a court of admiralty by citizens of the United States to whom she had belonged and from whom she had been forcibly taken in a foreign port, by his order, the district attorney filed a sugges-

tion stating the facts, and the circuit court having entered a decree for the libellants, disregarding the suggestion, this court upon an appeal taken by the attorney of the United States, reversed the decree and dismissed the libel, and Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "There seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

Probably the instructions here were that the district attorney should make defense for General Stanley and his fellow officers, and in addition he thought it wise to bring the rights of the United States to the attention of the court by application in their name.

The argument for the plaintiffs in error is confined to the disposition of the pleas setting up the statutes of limitation, in respect of which the decision did not turn upon the question whether on the facts the bar was or was not complete, but upon the view that although as between individuals a perfect defense might have been made out, it could not be availed of by or under the United States.

By the Texas statute relied on, it was provided that every suit to recover real estate "as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards." Title was defined to mean a regular chain of transfer from or under the sovereignty of the soil; and color of title to mean a consecutive chain of such transfer down to the person in possession, without being regular, as if one or more of the muniments were not registered or not duly registered. "Peaceable possession" was described as "such as is continuous, and not interrupted by adverse suit to recover the estate," and
27 "adverse possession" was defined as "an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another." The statute also provided that five years peaceable and adverse possession of real estate, "cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered," should be a bar; and that ten years like peaceable and adverse possession, with cultivation, use, or enjoyment, should have a like result; and also that whenever in any case the action of a person for the recovery of real estate was barred, the person having such peaceable and adverse possession should "be held to have full title, precluding all claims." (2 Sayles' Tex. Civ. Stats., 109, tit. 62, ch. 1.)

The supreme court of Texas was of the opinion that the bar of the statute could not be interposed by or under the United States, because the United States are not bound by such statutes, as well as because no action could be brought against the United States.

The rule that the United States are not bound and the reason for it are thus given in United States v. Nashville R. R. Co. (118 U. S., 120, 125): "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." And this doctrine was declared by the court in United States v. Insley (130 U. S., 263, 266) to be "applicable with equal force, not only to the question of the statute of limitations in a suit at law, but also to the question of laches in a suit in equity."

To the same effect Mr. Justice Story, in United States v. Hoar (2 Mason, 311), said: "The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the Crown, and, therefore, no delay should bar its right (though sometimes asserted to be because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects,
28 1 Bl. Com., 247), is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments. . . . But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the Government itself was in contemplation of the legislature before a court of law will be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different and often contrary force to the Government itself."

But, as observed by Mr. Justice Strong, delivering the opinion of the court, in Savings Bank v. United States (19 Wall., 227, 239), while the King is not bound by any act of Parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though not named. And he adds that the rule thus settled as to the British Crown is equally applicable to this Government; and that so much of the royal prerogative as belonged to the King in his capacity of parens patriæ or universal trustee enters as much into our political state as it does into the principles of the British constitution.

The general rule is stated in Chitty, on the law of the prerogative of the Crown (382), clearly to be "that though the King may avail himself of the provisions of any acts of Parliament, he is not bound by such as do not particularly and expressly mention him." "For it is agreed in all our books that the King shall take benefit of any act, although he be not named." (7 Coke, 32a; 11 Coke, 68b; 1 Leon., 150; 1 Blk. Com., 262.)

We think there is nothing to the contrary in Rustomjee v. The Queen, (L. R. I. Q. B. Div. 487), where, by a treaty between the Queen of
29 England and the Emperor of China, the Emperor had paid to the British Government a sum of money on account of debts due to British subjects from certain Chinese merchants who had become insolvent, and it was held that a petition of right would not lie by one of the British merchants to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants, and that the statute of limitations did not apply to a petition of right. The political trust with which her

majesty was charged in respect of her own subjects afforded no basis for the prosecution in a court of a claim as against a debtor or trustee, and, of course, limitation had no application. Indeed, the form of proceeding by petition of right even as simplified and regulated by 23 and 24 Vict., c. 34, is so far variant from proceedings between subject and subject as to give adjudications thereunder but slight, if any, bearing upon the question under discussion. (Tobin v. The Queen, 14 C. B. N. S., 505.)

It was in view of the ancient rule and its derivation that the supreme court of Wisconsin (in Baxter v. State, 10 Wis., 254) held that while the statute cannot be set up as a defense to an action by the Government, this rule being founded upon the public good and the protection and preservation of the public interest, instead of furnishing any support for the position that as a defendant the State could not have the benefit of the statute, would fully sustain the opposite conclusion.

And so, in People v. Gilbert (18 Johns., 227), it was pointed out, by way of illustration, that the same rule of construction applied to the statute concerning costs which the State may recover, though not obliged to pay them because not included in the general terms of the statute.

It is obvious that the ground of the exemption of governments from statutory bars or the consequences of laches has no existence in the instance of individuals, and we think the proposition cannot be maintained that because a government is not bound by statutes of limitation therefore the citizen cannot be bound as between himself and the Government.

Of course, the United States were not bound by the laws of the State,
yet the word "person" in the statute would include them as a body
30 politic and corporate. (Sayles, art. 3140; Martin v. State, 24
Tex., 68.)

This brings us to consider the objection that the United States cannot obtain or be protected in title through adverse possession, unless an action would lie against them for the recovery of the property. It by no means follows that because an action could not be brought in a court of justice, therefore possession might not be regarded as adverse so as to ripen into title. In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession, or of the abandonment of his claim by another, when an action cannot be brought, as the action itself when it can.

In Comegys v. Vasse (1 Pet., 193, 216), quoted from and applied by Mr. Justice Lamar in Williams v. Heard (140 U. S., 529, 543), it was remarked by Mr. Justice Story: "It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the King of Great Britain nor the Government of the United States is suable in the ordinary courts of justice for debts due by either. Yet who will doubt that such debts are right?" However, the very institution of this suit shows, as the fact is, that these claimants could have brought such an action as this at any time between the date when the United States took possession and the filing of this petition.

As stated by Mr. Justice Miller (in Cunningham v. Railroad Company, 109 U. S., 446, 451), it may be accepted as unquestioned that neither the

United States nor a State can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in this court by virtue of the original jurisdiction conferred by the Constitution. Accordingly, whenever it can be clearly seen that a State is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances
gone a long way in holding the State not to be a necessary part,
31 though its interests may be more or less affected by the decision.
Among these causes are those where an individual is sued in tort for some act injurious to another in regard to person or property, in which his defense is that he has acted under the orders of the Government.

In these cases he is not sued as an officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included United States v. Lee, 106 U. S., 196, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defence.

In such a case the validity of an authority exercised under the United States is drawn in question, and where the final judgment or decree in the highest court of a State in which a decision could be had is against its validity, jurisdiction exists in this court to review that decision on writ of error.

The case before us is an action of trespass to try title, brought against officers of the United States, exercising an authority under the United States, in holding possession of the property in controversy. Laying out in view the intervention by the district attorney of the United States in the direction of making the United States a party, and considering the case in its relation to the defences interposed by General Stanley and his fellow-officers, we are unable to perceive why the statutory bar, if complete, could not be availed of. Although not bound by statutes of limitation, the United States, as we have seen, were entitled to take the benefit of them, and inasmuch as an action could have been brought at any time after adverse possession was taken against the agents of the Government through whom that was done and by whom it was retained, the objection
can not be raised against them that the statute could not run because
32 of inability to sue. The alleged trespass was committed by the
defendants, as the servants of the United States and by their command, yet if they showed the requisite possession in themselves as individuals, though in fact for the United States, under whose authority they were acting, the defence was made out. Agents when treated as principals may rely upon the protection of the statute. Ware v. Galveston Company, 111 U. S., 170.

In any view they were not mere trespassers, and if subject to suit during the statutory period of peaceable and adverse possession, they could not, after its expiration, be found guilty of an unlawful withholding from the original owner. The tort, which must be the gist of the action in order to render it maintainable against the officers of the United States as individuals could not be predicated of them under such circumstances.

We refrain from any consideration of the case upon its merits, but, for the reasons indicated, reverse the judgment, and remand the cause for further proceedings not inconsistent with this opinion. Judgment reversed.

True copy.
Test:
[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court U. S.

(Filed June 12, 1893. Henry Umscheid, clk. D. C., Bexar Co. By Jos. Umscheid, deputy.)

Judgment of the court.

MARY U. SCHWALBY
vs.
DAVID S. STANLEY ET AL.
} No. 191.

On this 12th day of June, A. D. 1893, this cause came on to be heard upon the mandate of the supreme court of Texas, to this court directed, and issued upon the mandate of the Supreme Court of the United States.

Thereupon came the plaintiff Mary U. Schwalby and her husband, J. A. Schwalby, and the intervenor, Joseph Spence, jr., by their attorney Geo. C. Altgelt; the defendant' David S. Stanley, William R. 33 Gibson, Samuel T. Cushing, and J. C. Baily by their attorney, Henry Terrell; and also came the United States of America by Henry Terrell, assisting district attorney for the United States for the western district of Texas, and submitted the matters in controversy as well of law as of fact to the court.

Whereupon, after hearing the pleadings read, the evidence by all parties adduced, and argument of counsel thereon, it was ordered, adjudged, and decreed by the court:

That the intervenor, Joseph Spence, jr., take nothing by his suit and that he pay the costs by him incurrred, for which execution may issue.

That the plaintiff Mary U. Schwalby, joined by her husband, J. A. Schwalby, do have and recover of and from the defendants David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, one undivided one-third interest in the following-described land, to wit: All that certain tract or parcel of land lying and being in the State of Texas, county of Bexar, city of San Antonio, and being lot number one (1) in block number 2, being a subdivision of original lot number one (1), in range number four (4), in district number one (1), of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for Anthony M. Digbowity by G. Friesleben, city surveyor of said city; said lot has a front of thirty-two (32) varas on Grayson street and a depth of ninety (90) varas.

It is further adjudged by the court that the United States of America take nothing by their pleading in this behalf filed except as hereinafter stated.

It is further adjudged that said plaintiffs do have and recover of and from defendants David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, their costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged, and decreed by the court that plaintiffs have their writ of possession against the said defendants and all other persons who have entered said premises since the filing of this suit on the 23rd day of February, 1889, placing them in joint possession with defendants, subject, however, to the conditions hereinafter named.

34 It is considered by the court that the United States of America are entitled to one-third of the value of the improvements made by them in good faith and that such one-third of the value of said improvements so made by them are worth the sum of three hundred thirty-three $\frac{33}{100}$ dollars ($333\frac{33}{100}$).

It is considered by the court that the value of the use and occupation of one-third interest in said premises by the defendants amount to one hundred twenty-six dollars $\frac{66}{100}$ (126.66).

It is considered by the court that the value of said one-third interest recovered is eight hundred thirty-three and $\frac{33}{100}$ dollars.

Wherefore it is further adjudged by the court that the United States of America are entitled to recover the excess of the value of such improvements over the value of the use and occupation aforesaid, and amounting to two hundred and six $\frac{67}{100}$ dollars ($206.67).

It is accordingly adjudged that no writ of possession shall be issued for the term of one year after the date of this judgment unless said plaintiffs shall pay to the clerk of this court for said United States of America the aforesaid amount of two hundred and six $\frac{67}{100}$ dollars ($206.67), with interest thereon from this day at the rate of six per cent per annum. If the said plaintiffs shall neglect for the term of one year to pay over the amount of said judgment in favor of said United States, with interest thereon, as directed, and said United States shall within six months after the expiration of said year pay to the clerk of this court for said plaintiff the value of said land, to wit, the sum of eight hundred thirty three $\frac{33}{100}$ dollars ($833.33), then the said plaintiff shall be forever barred of their writ of possession or from ever having or maintaining any action whatever against said defendants and the United States of America for said land and tenements.

If the said United States of America or their legal representatives shall not within the six months aforesaid pay over to the said clerk for the plaintiffs the said estimated value of the land as hereinbefore directed, then the said plaintiff' may sue out their writ of possession as in ordinary cases, free and discharged from the foregoing conditions.

35 And thereupon all parties, to wit, the plaintiff, the intervenor, the defendants, and the United States of America in open court excepted to the judgment of the court and gave due notice of appeal.

All parties also requested the court to file its finding of facts and conclusions of law, which motion was by the court granted, each and every party excepting to the judgment aforesaid and findings of fact and conclusions of law and praying an entry of such exception in the judgment, which is now here done.

Order granting time to file statement of facts.

MARY U. SCHWALBY
vs. } No. 191.
DAVID S. STANLEY ET AL.

On this 15th day of June, A. D. 1893, it was, upon motion of all the parties hereto, ordered that each and every party to the suit shall have ten days after the adjournment of the term to file a statement of facts.

Statement of facts. Filed June 27, 1893.

In Bexar County district court, 45th judicial district. April term, 1893.

MARY U. SCHWALBY
vs. } No. 191.
DAVID S. STANLEY ET EL.

Be it remembered that upon the trial of the above-entitled case the following evidence was adduced:

Plaintiff's and intervenor's evidence.

I.

Plaintiffs and intervenor read in evidence a stipulation in writing, signed by counsel, wherein the parties agreed that Anthony M. Dignowity is the common source of title, under whom all parties hereto claim the land in controversy.

II.

36 Plaintiff and intervenor read in evidence a legally sufficient power of attorney from said Anthony M. Dignowity to Amanda J. Dignowity, his wife, dated September 13th, 1858, recorded in Bexar County November 16th, 1858, which power of attorney gave said Amanda J. Dignowity full power to convey real estate and to deliver deeds therefor, the power of attorney being general.

III.

Plaintiff and intervenor read in evidence a general warranty deed to the land in controversy and described in their pleadings, from Anthony M. Dignowity, acting by Amanda J. Dignowity, to one Duncan B. McMillan, which deed was dated May 9th, 1860, and duly acknowledged before W. H. Cleveland, notary public, Bexar County, Texas, and again duly acknowledged on December 10, 1889, before W. H. Houston, notary public, Bexar County, Texas. The aforesaid deed recites a consideration of one hundred dollars "in hand paid,' receipt whereof is acknowledged," and is in the form of a statutory warranty deed, and was filed for record on the 30th day of September, A. D. 1889, and duly recorded on the first day of October, 1889.

IV.

Plaintiff and intervenor read in evidence the deposition of the plaintiff Mary U. Schwalby, taken April 19th, 1889, and in substance as follows: My name is Mary Uran Schwalby. I am forty years old, and live near Iola, in Grimes Co., Texas. I knew Duncan B. McMillan. I knew him both in Louisiana and Texas from my earliest recollection. I am the daughter of Duncan B. McMillan, who was a married man. Duncan B. McMillan was married to Pumelia Hart on the 5th day of February, 1847, in Jasper County, Texas. I am in possession of the family Bible in which are recorded the marriages and deaths of my father Duncan B. McMillan's family.

Duncan B. McMillan and his wife had five children, viz: Mary Uran McMillan, who was born on the 11th day of September, 1848; Duncan Wynn McMillan, who was born on the 2nd day of November, 1850; Saint McMillan, who was born October 12th, 1852; Sarah McMillan, who was born on the 3rd day of August, 1854; Teresa McMillan, who was born on the 6th day of April, 1857.

Duncan B. McMillan is dead. He died in DeSoto Parish, Louisiana, the 5th day of February, 1865. Permilia McMillan, wife of D. B. McMillan, is dead. She died on the 4th day of July, 1860, in
37 DeSoto Parish, La.

There were three children living at the time of Duncan B. McMillan's death. Terrissa McMillan died on the 14th day of December, 1858; Saint McMillan died on the 10th day of October, 1860; Sarah Neely died on the 17th day of August, 1878. There were four daughters—Mary Uran McMillan, Saint McMillan, Sarah McMillan, and Terrissa McMillan.

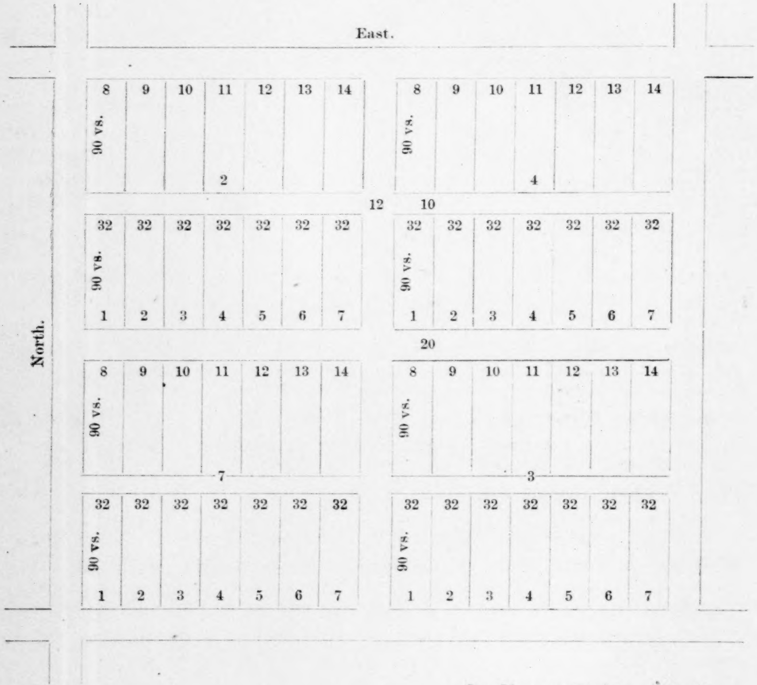
Two of the daughters of Duncan B. McMillan were married; Mary Uran McMillan was married to J. A. Schwalby on the 18th day of January, 1871, and Sarah McMillan was married to J. A. Neely on the 14th day of February, 1875. I am still married. My husband, J. A. Schwalby, is living. I know D. W. McMillan lives at or near Devine, Medina County, Texas. I remember that my father, Duncan B. McMillan, lived in the State of Louisiana, in De Soto Parish, nearly 30 miles SW. of Shreveport, La. Mrs. Sarah Neely was the mother of two children, who are still living.

V.

Plaintiff and intervenor, after proving the handwriting of G. Friesleben, city surveyor, introduced in evidence original plat, as follows, to wit:

Plat of the survey and division of lot No. one (1) in range 4, dist. 1, belonging to A. M. Dignowity.

[Scale, 100 vas. per in.; var., 9° 45 east.]



G. FREISLEBEN, *City Sr.*

SAN ANTONIO, *April 16th*, 1860.

38 VI.

Plaintiff and intervenor called the defendant, Gen. David S. Stanley, who testified as follows: I am one of the defendants in this suit. I know the land sued for; it is on the corner of Pine and Grayson streets. Myself and the other defendants were in possession of the lot when this suit was brought.

I am a brigadier-general in the United States Army; my codefendants are officers in the United States Army. We took, held, and hold such possession as such officers of the U. S. Army.

Cross-examination:

The Government of the United States took actual possession of the land in controversy in the year 1882. The land sued for is part of the military reservation of the United States of America at San Antonio. We hold possession under the United States of America. According to my understanding the United States first took possession of this lot in the year 1875 or 1876; it was then open prairie. We do not claim title to the land in our own right, but hold it for the United States. The United States have made the following improvements upon the lot in controversy before the institution of this suit, to wit: The ground has been cleared off. Two frame houses have been built upon the land. I can not say what they are worth. They cost from three hundred to five hundred dollars each. One servants' house has been built upon the land which cost from two to three hundred dollars. I do not know what it is worth. There are 370 feet of fence upon the land, which are worth $.50 a foot. There are two sheds upon the land worth from thirty to forty dollars each. The grading and filling of the lot would cost one hundred dollars. These improvements were made since the year 1881; before that the lot was open prairie. I never heard of a claim against this land until the commencement of this suit. My understanding has always been that this land was donated by the city of San Antonio to the United States. If the United States paid the city anything for it I know nothing about it. The lot without improvement is worth twenty-five hundred dollars.

39 Reexamination of plaintiff and intervenor:

I know the general locality of the disputed land. I never saw it measured out, nor do I know its exact lines; I will not swear that the lot in controversy was increased in value one cent by reason of the improvements upon it. On the contrary, if a man wanted the lot for a residence the improvements now upon it would be an encumbrance and would be worth next to nothing. When I speak of value and cost of the houses I mean that it would cost the Government to replace them, considering the cost of lumber and labor. The improvements are all made of lumber, not of stone or brick. The rent of the lot without improvements would be worth very little, if anything. I can not say that the rent of the naked lot would be five dollars a month. Five dollars a month for the naked lot would be the extreme limit. The lot with improvements might be worth fifteen dollars' rent a month. The houses mentioned by me as being upon the lot are not wholly upon the lot, but stand about one-third upon other land that the Government acquired from the city. These houses could not be removed without total loss; that is, if the two-thirds upon this lot were taken down, the remaining one-third of the house would be valueless, except as old material, which is worth next to nothing. Some of the 370 feet of fence is not upon lot, but upon ground formerly known as Pine street, which the Government acquired from the city.

The intervenor introduced in evidence a deed of conveyance dated the 26th day of March, 1889, duly acknowledged the same day, filed for record March 29th, 1889, whereby D. W. McMillan, of Devine, Medina County, Texas, conveyed to Joseph Spence, jr., the intervenor, the land in controversy. This deed described the land as the same is given in plaintiff's and intervenor's pleadings, and recites that said lot was conveyed to Duncan B. McMillan, the deceased father of the vendor, by Anthony M. Dignowity, by deed dated the 9th day of May, 1860.

40 Plaintiffs offered in evidence a certified copy from the records of Grimes County, Texas, of the marriage license issued by the dis-

trict clerk of said Grimes County, on the 14th day of January, 1871, authorizing any person legally authorized to celebrate the rites of matrimony to join in marriage as husband and wife J. A. Schwalby and Mary U. McMillan, and also the return made upon said license on the 8th day of February, A. D. 1871, by A. W. Smith, justice of the peace, certifying that he had on the 18th day of January, 1871, joined in marriage as husband and wife the said J. A. Schwalby and Mary U. McMillan.

Plaintiff and intervenor thereupon rested their cause.

Defendants read in evidence in support of their second plea in bar the following instruments:

I.

Agreement on file, dated March 7, 1890, agreeing that A. M. Dignowity, deceased, is the common source of title through whom the plaintiff and the defendant, the United States of America, claim the lot in controversy, filed in this cause March 7, 1891.

II.

Last will and testament of A. M. Dignowity, deceased, and the probate thereof in Bexar County, Texas, said will bearing date the 16th of November, A. D. 1870, and the probate thereof the 22nd day of April, A. D. 1875, and in which he bequeathes all his estate and all his interest in the community estate of himself and his wife, Amanda J. Dignowity (all of his estate being community property), to the said Amanda J. Dignowity, and making her independent executrix of his said last will, with full powers of sale and disposition of all his property, and requiring no bond or inventory of property.

III.

Deed from Amanda J. Dignowity, in her own right and as independent executrix of the last will and testament of Anthony M. Dignowity, deceased, to the city of San Antonio, Texas, of date May 1st, 41 A. D. 1875, for lot number one (1), in block number two (the lot in controversy), and duly recorded in Bexar County land records June 1, 1875. This deed, so far as concerns the lot in controversy, is a quitclaim, the import of the deed being as hereinafter stated. This deed also conveys other property and is hereinafter inserted in substance and effect.

IV.

Warranty deed from the city of San Antonio, Texas, dated 16th day of June, A. D. 1875, and duly recorded in the land records of Bexar County, Texas, on the 21st day of October, 1875, conveying to the Government of the United States of America for military purposes, among other property, lot one (1), block two (2), said lot 1 being the lot in controversy in this suit. The consideration of this deed being one dollar and other considerations as hereinafter fully stated.

Defendants read in evidence in support of their third plea in bar, the same being attached to and made a part of their second amended original answer, a certified copy of proclamation signed by O. M. Roberts, governor of the State of Texas, dated the third day of March, A. D. 1881, ceding exclusive jurisdiction over the lot in controversy in this suit to the United States of America, under Title XV of the Revised Civil Statutes of Texas, the said proclamation being recorded in the county records of Bexar County, Texas, in vol. 27, pages 608 and 609.

Defendants' evidence.

Defendants read in evidence the aforesaid stipulation in writing, signed by counsel, wherein the parties agreed that Anthony M. Dignowity is the common source of title, under whom all parties hereto claim the land in controversy.

42 Defendants read in evidence the last will and testament of Anthony M. Dignowity, deceased, and the probate thereof in Bexar County, Texas, said will bearing date the 16th November, A. D. 1870, and the probate thereof the 22nd day of April, A. D. 1875, and in which he bequeaths all his estate and all his interest in the community estate of himself and his wife, Amanda J. Dignowity (all of his estate being community property), to the said Amanda J. Dignowity, and making her independent executrix of his said last will, with plenary powers of sale and disposition of all his property, and requiring no bond or inventory of property.

Defendants then read in evidence to the court a deed from Amanda J. Dignowity in her own right and as independent executrix of the last will and testament of Anthony M. Dignowity, deceased, to the city of San Antonio, Texas, of date first day of May, A. D. 1875, and in which said deed, after specifying certain other lots of land therein sold, provides as follows: "Also to release and quit claim to said city of San Antonio all my right, title, and interest in lot number one (1), in same block (No. 2) two, known as the McMillan lot. Also all my right, title, and interest to said block No. (2) two. To have and to hold all and singular the premises above mentioned, with the rights, members, hereditaments to the same belonging or in any wise incident or pertaining, unto the said city of San Antonio and its assigns forever. And I hereby bind myself as a party to this instrument, and so far as I am executrix as aforesaid and by law authorized, bind all the heirs, devisees, legatees, distributees, and personal representatives of said estate to warrant and forever defend all and singular the said premises unto the said city of San Antonio and its assigns, against any person whomsoever lawfully claiming or to claim the same or any part thereof, by, in, or through Anthony M. Digbowity, deceased, or the estate of the said Anthony M. Dignowity, deceased, and none other, &c., &c."

The consideration of the above deed is $1,500.00 for all the lots conveyed therein, to wit, lots 8 and 9 and 10, in block No. 2, and lots No. 1 in same block, and the said deed was duly recorded in the Bexar County land records on the 1st day of June, 1875.

43 Defendants then read to the court in evidence a warranty deed from the city of San Antonio, Texas, dated 16th day of June, 1875, and in which the said city of San Antonio "for and in consideration of one dollar paid to the city of San Antonio by the said Government (of the United States), the receipt whereof is hereby acknowledged, and for divers and other good and sufficient considerations therunto moving," con-

veys to the Government of the United States of America, for military purposes, many lots and block 2 of said estate, and among which are lot number one (1), and No. (8) eight, and No. (9) nine, and No. (10) ten, in block No. 2, subdivision of lot No. 1, the said lot No. (1) one above being the lot in controversy in this suit, and the same conveyed to the city, as set out in deed to said city of San Antonio from Mrs. Amanda J. Dignowity, set out above.

Defendants then read in evidence to the court the deposition of Mrs. Amanda J. Dignowity, taken on motion of the plaintiffs in this case, but not read by them, who swears as follows in deposition of date 23rd day of July, 1889: My name is Amanda J. Dignowity; I reside in the city of San Antonio, Texas; I have resided in Bexar County since about the year 1846; I knew Anthony M. Dignowity since 1840; Anthony M. Dignowity is dead; he died in the year 1875, at San Antonio, Texas; he was my husband.

I am the Amanda J. Dignowity who acted as executrix of the last will of Anthony M. Dignowity, and I was his wife.

I believe lot 1, block 2, out of original lot 1, range 4, district 1, to be a portion of the property now known as Government Hill and bought of me by the city through its mayor, James H. French. I have examined the certified copy of deed purporting to be a deed from me, for myself and as executrix of the last will of Anthony M. Dignowity—deed to the city of San Antonio, date May 1st, 1875. Lot 1, in block 2, named in that deed was called by me the McMillan lot, because it was the habit of my husband during his lifetime, whenever he sold a city lot, to mark the name of the purchaser in pencil on the map, and when the lot was paid for to write the name in ink. I presume I found this lot marked
44 in the name of McMillan in pencil, and therefore called it the McMillan lot. This is the only explanation I am now able to give. I can not now remember the price or value of the three lots, 8, 9, and 10, at the time of sale to the city. I made my deed to the city a quitclaim deed so far as lot No. 1, in same block, is concerned, for the reasons mentioned above. I can imagine no other reason. I must have known in some way that the lot had been sold and a payment made on it, and I know of no other way I should have known it except as stated above. I cannot now tell how much of the consideration in the deed was paid by the city for the McMillan lot, or lot 1, in block 2. I negotiated the sale to the city of San Antonio with James H. French, mayor; James P. Newcomb, and Sam S. Smith, and I think the trade was completed by Gen'l W. H. Young, who received the money from me. I have no recollection of a conversation with any one of them with special reference to lot 1, block 2, nor did I know at that time.

Cross-examination:

I held a power of attorney from Anthony M. Dignowity, with general power to sell his real and personal estate, about the year 1859 or 1860. I do not remember the date of this power of attorney, but I believe it is of record; I never held but the one.

I never knew Duncan B. McMillan, or if I did, I have no recollection of him. If I ever had any business transactions with him, I have entirely forgotten them. I may have, in the year 1860, had business with Duncan B. McMillan relating to the sale to him of a lot of land in San

Antonio; but if so, I have entirely forgotten it. I have no recollection of ever making a deed to Duncan B. McMillan of lot 1 (one), in block 2 (two), subdivision of original lot No. 1 (one), range 4 (four), district 1 (one), though I may have done so. If such a deed was made by me 39 years ago I do not see why it was not recorded, unless, perhaps, the full purchase money had not been paid. As all my papers were destroyed by fire during the war, I have no means of ascertaining the truth of the matter. I do not believe Duncan B. McMillan did pay cash in hand, though I have no recollection of the transaction at all.

Anthony M. Dignowity lived until the 22nd day of April, 1875,
45 which is about fifteen years ago. I do not know who was in pos-
sess' of the lot in controversy from 1860 to the time of his death, but believe it was unoccupied. I do not know that it was claimed by anyone but Anthony M. Dignowity. I paid the taxes on them during that time, from 1860 to the death of my husband. I never took actual possession of the lot, but continued to pay the taxes until it was sold to the city. I never had said lot in actual possession and never had a tenant on it. There was a butcher pen in the neighborhood, but it was on a lot purchased by the butcher and afterwards sold by him to the Government. I think the butcher's name was Lang. He purchased his lot from my husband long before 1860; I think it was the first lot sold out of the tract. Neither Duncan B. McMillan, nor anyone for him, nor any of his heirs ever claimed an interest in the lot in suit in this case, from 1860 to 1875, to my knowledge.

When I sold the lot in controversy to the city of San Antonio I acted in good faith. I believed for some reason that Duncan B. McMillan had some claim on the lot or I should not have specially quitclaimed it to the city, and I believe, as I have before stated, that my knowledge of this claim was derived from seeing his name on the map in pencil showing that he had made partial payment for the lot, and when I sold to the city I sold subject to this claim, if any existed; that is, I sold my interest in the lot. It is possible that at the time I knew just what the claim was, but if I did, it has passed entirely from my recollection. I did not write the deed to the city; I never wrote a deed in my life. I signed it myself. I cannot say whether McMillan had tried to buy the lot in controversy and failed to pay the balance.

I usually write my name Amanda J. Dignowity, but when requested to do so, as I was when I made the deed to the city, I write my full middle name. I have done so on several other occasions.

Defendants then read in evidence to the court the deposition of the same witness, Mrs. Amanda J. Dignowity, taken on motion of the defend-
ants, of date 31st day of December, A. D. 1889, as follows: I am
46 in my seventieth year, and reside in San Antonio, Texas. I was
Anthony M. Dignowity's wife. Yes, I had a power of attorney from Anthony M. Dignowity to sell lands of his on or about the year 1858. I never had but one power of attorney from him.

When I gave my deposition to Capt. Houston last summer I stated then that I never knew a man by the name of Duncan B. McMillan, but the questions then propounded to me put me to thinking, and I afterwards recollected and from some old papers my memory was refreshed on the subject so that now I answer of a Mr. D. McMillan coming to my house with his wife. I saw him only once and that was during the early part of the Confederate war; he was returning to his home in Louisiana.

I have seen the original of the deed from me to D. B. McMillan, dated May 9th, 1860, and made under a power of attorney given to me by Anthony M. Dignowity, and have sworn to my signature and know it to have been executed at that time. I was shown the deed by Capt. Wm. Houston. My daughter, Mrs. J. T. Hambleton, was present and no one else. I have never seen it but that one time since it was executed by me until to-day. I carefully examined it, and it is a genuine deed. I do not know why said deed was never recorded until a few months ago. I don't know whether I ever delivered possession of the lot in controversy to Duncan B. McMillan or his agent for him formally or not. I paid taxes on the land until it was sold subsequently. I don't remember of receiving but fifty (50) dollars on the transaction and think that was paid before the date of the deed. I don't recollect anything more than that I was paid fifty dollars on the trade, and I executed the deed and acknowledged it before Mr. Cleveland and left it with him. The deed is the same shown to me to-day and marked "Exhibit A" of this deposition.

Cross-examination:

I have not seen Duncan B. McMillan since 1860. He was then on his way home to Louisiana. I positively know that the deed from me as attorney in fact to Duncan B. McMillan, conveying the lot in controversy in this suit, is a true and genuine instrument. It is not a forgery; it is a true and genuine deed.

I do remember W. H. Cleveland. He was a lawyer in good standing about the year 1860. He did at times attend to business both for myself and husband. I have owned and sold considerable real estate 47 in Texas, and still own property and have experience in dealing in lands and city lots.

The deed from me to McMillan recites a consideration of $100, but I do not recollect of receiving but fifty. I received fifty dollars, as before stated; my husband never received a cent. I don't know anything about what other persons may have received. I know nothing of any note. I don't know anything about the money having been paid to Cleveland; if it was, I don't know anything about it. My recollection as to the real consideration of the deed is not clear and distinct. I have given the statement about it as correctly as I can remember. I had forgotten the consideration named in the deed, but after seeing it recited in the deed remember that I received only fifty dollars. When I made the quitclaim deed to the city for this same lot I did not advise the parties who negotiated with me that said lot was the McMillan lot, and that I therefore could make only a quitclaim deed. Having paid the taxes on it for so many years, I considered I had an equity in it.

Defendants read in evidence to the court the deposition of one D. W. McMillan, taken on motion of plaintiff and intervenor, but not read by them, who swears as follows: My name is Duncan Wynne McMillan. My place of residence is Devine, Medina County, Texas. I know Mary U. Schwalby; have known her about twenty-five years. She is my sister. I did know Duncan B. McMillan. He is my father. Duncan B. McMillan is dead. He died at Keachie, Louisiana, in 1865. Duncan B. McMillan lived in De Soto Parish, La., and Grimes County, Texas.

He was a married man. He married Parmelia Hart. I do not remember the date of the marriage. Duncan B. McMillan had five children by his wife: Mary U. McMillan (girl), whose birthday I do not remember; Saint McMillan (girl), whose birthday I do not remember; Sallie McMillan (girl), whose birthday I do not remember; Terissa McMillan (girl), whose birthday I do not remember; Duncan Wynne McMillan (boy), born November 2nd, 1850.

The wife of Duncan B. Millan is dead. She died about the year
1863. Three of Duncan B. McMillan's children survived him: Sallie
Nealy, who died at Keachie, La.; Mary U. Schwalby, living, who
48 resides at Iola, Grimes County, Texas, and Duncan Wynne, living,
who resides at Devine, Medina County, Texas. Two of Duncan
B. McMillan's children died before he died. Their names are Saint and Terissa (girls). Two of Duncan B. McMillan's girls are married: One, Mary U. Schwalby, married J. A. Schwalby about the year 1887; do not remember exactly; Sallie McMillan married J. A. Neely in 1876, as well as I remember.

The above is about all I know, only I heard my father say, when he left Louisiana, that he would probably move to San Antonio, where he had a lot, and would live on it."

J. H. French, a witness for defendant, sworn, said: I was mayor of the city of San Antonio in 1875, at the time the city purchased the property from Mrs. Dignowity. The city paid the consideration, $, to Mrs. Dignowity, in 1877. The Government buildings, the officers' quarters, were placed upon the Dignowity property. The city had the title examined by A. J. Evans.

When the city purchased from Mrs. Dignowity and paid the money the city had notice of this claim; that is, the claim of D. B. McMillan. We had this notice from Mrs. A. J. Dignowity. Mrs. Dignowity refused to give a warranty deed to the lot in controversy. The report of the special committee to the city council, read by counsel and to be found hereinafter, refers to this property. I, as mayor of the city, had notice of the McMillan claim at the time the city purchased. There was no consideration paid direct from the Government to the city for the property. It was a donation from the city to the Government.

Reexamined:

City never received any consideration from the Government for the conveyance, but by reason of the establishment of the military headquarters here the city has received a thousand fold benefit on the consideration paid by her to Mrs. Dignowity.

49 A. J. Evans, for the defendants, said: I, as United States district attorney for the western district of Texas, in 1875, made an examination of the title to the lot in controversy and traced the title back to the case of Lewis vs. City of San Antonio.

I examined the records of deeds for Bexar County, Texas, and did not find any deed of record from Dignowity, and after I had made the examination I believed the title was good. I so advised the Department at Washington, and upon my advice the Government took the deed from the city in good faith.

Cross-examined:

I made the examination of the title as U. S. attorney, and advised that the title was good. I saw the deed from Mrs. Dignowity as executrix, etc., to the city of San Antonio, read it, and had notice of all its recitals. I had information of the sale to Duncan B. McMillan, but I satisfied myself that he had never paid the purchase money.

(This question was asked the witness:) Mr. Evans, when you read the deed *to* Mrs. Dignowity to the city of San Antonio and saw there the lot in dispute was quitclaimed and described as being known "as the McMillan lot," did not these facts create in your mind a suspicion that the title to this lot was not all right?

To this question the witness answered, "They did not."

Ben Cleghorn, for the defendant, said: My name is Ben Cleghorn. I am quartermaster storekeeper at the Government depot, headquarters Department of Texas, San Antonio, Texas. I know the lot in controversy in this suit. It is a part of the military reservation, San Antonio, Texas. The United States fenced in this lot in 1880 or 1881, and have had possession of the same under fence ever since that time.

Defendants call **George C. Altgelt**, who testified: I am plaintiff's attorney. I do not know Mrs. Mary U. Schwalby personally. I received the deed to Duncan B. McMillan from Amanda J. Dignowity, attorney
in fact for Anthony M. Dignowity, by mail. It was sent to
50 me by Joseph Spence, jr., who is a lawyer and land agent of San
Angelo, Tom Green County, Texas. I never saw Mrs. Schwalby.

The defendants then introduced as a witness the defendants **David S. Stanley** and **Geo. J. Koster**, civil engineer and architect, who on oath gave a detailed statement of the character of the improvements put upon lot 1, block 2, in controversy, and said the United States had commenc*ing* in 1882 to improve the lot, and had erected thereon two wooden houses of the cost of $500.00 each, and one servant's house cost $300.00; three hundred and seventy feet (370) *feet* of fencing cost 50 cents per foot, $185.00; one shed cost $250.00; one shed cost $100.00. He, David S. Stanley, said that the rent of the naked lot No. 1, block No. 2, without improvements, was simply nominal or zero.

That on his first examination he had placed the value of the lot No. 1, block 2, at $2,500.00, but upon further reflection, judging from the sale of similar contiguous lots made a few days since, that the lot No. 1, in block 2, is of the value of $2,000.00; but if the Government had not made the improvements the lot would not be worth $250.00.

Cross-examination:

I do not know the actual value of the improvements. The figures named by me are based upon what it would cost the Government to replace the improvements at this time, considering the cost of material and labor. I can not say that the lot is actually increased in value by these improvements; in fact, the improvements would be an incumbrance to a man who wanted the lot for a residence lot. The 370 feet of fence are not wholly upon this lot; they are mainly in the street, but would be lost to the Government if the lot is taken away. The two wooden houses are in the same situation. They are situated two-thirds upon the lot and one-third upon what formerly was Pine street. The one-third on Pine street would be valueless if the two-thirds upon the lot were taken down.

51 Plaintiffs' and intervenor's evidence in rebuttal.

Plaintiff and intervenor read the following extracts from the proceedings of the city council of the city of San Antonio, to wit:

D; 170, 170.—Regular meeting of the city council.

TUESDAY, *June 1st*, 1875.

Present, his honor James H. French, mayor, Aldermen Dashiell, Sweeney, Chavez, Schreiner, Smith, Hahn, Prescott, Kiolbassa, McAllister, and Muench.

Absent, Aldermen Teel and Degner.

The special committee appointed at a former meeting of the board to purchase the additional land required for a site for the quartermaster's depot, made the following report:

To the Honorable City Council of the City of San Antonio:

Your special committee appointed at your meeting on the 27th ult. beg leave to submit the following report, to wit:

Pursuant to the authority conferred by said resolution, we have made the following purchases, viz:

3 lots	of Adams and Wickes, at $300 each	$900.00
4 lots	Mrs. A. J. Dignowity for	1,500.00
3 "	Smith et als., 1,000 gold	1,147.50
4 "	Mrs. P. Fox, 1,100 silver	1,202.50
	Expenses attending purchase from Mrs. Fox	256.00
	Total	5,006.00

Mrs. Fox being a resident of Laredo, your committee deemed it best to send an agent at once to that place and consummate the purchase and not to wait the necessary delays incident to a correspondence by mail. We did this, believing it the interest of all parties that the matter should be closed as soon as possible.

The title of one lot we have not yet been able to perfect, but have purchased of Mrs. Dignowity her interest therein for $150.00. Deducting this amount from the total of $5,006.00 will leave $4,856 paid for 13 lots, or an average of $373.54 c'y per lot. We consider these prices, under the circumstances, reasonable.

The condition of our finances would not permit the payment of this amount from the city treasury. We therefore negotiated a loan of $4,750.00 from Messrs. Bennett and Thornton, payable in eight
52 (8) months at 12% interest on the credit of this city, and respectfully request your honorable body that an appropriation for the amount, with interest ($5,130), be made from the contingent fund to pay the obligation of the city at the maturity thereof.

Cross-examined:

I made the examination of the title as U. S. attorney, and advised that the title was good. I saw the deed from Mrs. Dignowity as executrix, etc., to the city of San Antonio, read it, and had notice of all its recitals. I had information of the sale to Duncan B. McMillan, but I satisfied myself that he had never paid the purchase money.

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The condition of our finances would not permit the payment of this amount from the city treasury. We therefore negotiated a loan of $4,750.00 from Messrs. Bennett and Thornton, payable in eight
52 (8) months at 12% interest on the credit of this city, and respectfully request your honorable body that an appropriation for the amount, with interest ($5,130), be made from the contingent fund to pay the obligation of the city at the maturity thereof.

In conclusion, we recommend the adoption of the following ordinance, to wit:

Ord. No. 15.—Be it resolved by the city council of the city of San Antonio, That whereas in accordance with a resolution of this board, passed on the 27th of April, 1875, the mayor was authorized and directed to purchase additional lots in block No. 2, subdivision of lot No. 1, range 4, district 1, adjoining the land previously donated by the city to the U. S. Government for a depot; and,

Whereas, the mayor having purchased said lots from Adams and Wickes, A. J. Dignowity, C. P. Smith et als., and Mrs. Pauline Fox, that said purchase be in all things confirmed.

And whereas the said lots and parcels of ground have been purchased as aforesaid, for the purpose of donating the same to the Government of the United States for military and other public uses,

Therefore, be it further resolved, that the said mayor be, and is hereby, authorized and directed to execute and deliver a good and sufficient warranty deed of gift or donation of each and all said lots or parcels of land to the Government of the United States as aforesaid, and that in accordance with section 57 of the city charter all streets, alleys, and sidewalks in said block No. 2, subdivision of lot No. 1, intended by this ordinance to be conveyed to the Government of the United States be, and are hereby, declared forever closed and abolished, and the same are hereby authorized to be conveyed, as part and parcel of said block 2, to the Government of the United States. All of which is respectfully submitted.

J. H. French,
Mayor and Chairman,
Geo. R. Dashiell,
Sam S. Smith,
M. Muench,
F. Hahn,
Committee.

Which report was unanimously adopted.

53 We, the undersigned attorneys for plaintiff, intervenor, and defendants, hereby agree that the above is a true and correct statement of the facts proved upon the trial of said cause.

Geo. C. Altgelt,
Attorneys for Plaintiffs and Intervenor.

Henry Terrell,
Assistant U. S. Attorney, Attorney for Defendants and the United States of America.

Approved:

W. W. King, *District Judge.*

(Filed June 27, 1893. Henry Umscheid, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

Defendants' bill of exceptions No. 1. *Filed June* 17, 1893.

In district court, Bexar County, Texas, fourth term, 1893, forty-fifth judicial district, June 12, 1893.

MARY U. SCHWALBY ET AL.
vs. } No. 191.
D. S. STANLEY ET AL.

Be it remembered that on the trial of this cause came on to be heard defendants' first plea in bar, and proof being made of the several facts alleged in said plea in bar, the same was overruled by the court as showing no legal bar to this action; to which defendants excepted and herewith tender their bill of exceptions and ask that the same may be signed and sealed and made a part of the record in said cause, which is accordingly so done.

The foregoing bill of exception is approved with qualifications that there was no evidence offered on the hearing of said plea by any party other than that which is also found in the statement of facts, and in the pleadings and exhibits to said plea in the cause.

W. W. KING, *Judge 45th District.*

(Filed June 17, 1893. Henry Umscheid, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

54 *Defendants' bill of exceptions, No.* 2. *Filed June* 17, 1893.

In district court, Bexar County, Texas, 4th term, 1893, 45th judicial district, June 12, 1893.

MARY U. SCHWALBY ET AL.
vs. } No. 191.
D. S. STANLEY ET AL.

Be it remembered that on the trial of this cause came on to be heard defendants' second plea in bar, and proof being made of the several facts alleged in said plea in bar, the same was overruled by the court as showing no legal bar to this action, to which defendants excepted, and herewith tender their bill of exceptions, and ask that the same may be signed and sealed and made a part of the record in said cause, which is accordingly so done.

The foregoing bill of exception is approved with qualification that there was no evidence offered on the hearing of said plea by any party other than that which is also found in the statement of facts and in the pleadings and exhibits to said plea in the cause.

W. W. KING, *Judge 45th District.*

(Filed June 17, 1893. Henry Umscheid, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

Defendants' bill of exceptions, No. 3.

In district court, Bexar County, Texas, 4th term, 1893, 45th judicial district, June 12, 1893.

JUNE 17, 1893.

MARY U. SCHWALBY ET AL.
vs. } No. 191.
D. S. STANLEY ET AL.

Be it remembered that on the trial of this cause came on to be heard defendants' third plea in bar, and proof being made of the several facts alleged in said plea in bar, the same was overruled by the court as showing no legal bar to this action, to which defendants excepted, and herewith tender their bill of exceptions and ask that the same may be signed
55 and sealed and made a part of the record in said cause, which is accordingly so done.

The foregoing bill of exception is approved with qualification that there was no evidence offered on the hearing of said plea by any party other than that which is also found in the statement of facts and in the pleadings and exhibits attached to said plea in the cause.

W. W. KING, *Judge 45th District.*

(Filed June 17, 1893. Henry Umschied, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

Petition for writ of error by defendant United States of America. Filed June 7, 1894.

In the district court of Bexar County, Texas, for the 45th judicial district.

To the Honorable HENRY UMSCHEID, Esq.,
Clerk of said Court:

Your petitioners, the United States of America, plaintiff in error, appearing by their attorney, R. U. Culberson, represent:

That at a regular and stated term of said court, on the 12th day of June, A. D. 1893, in cause numbered 191 on the docket of said court, styled Mary U. Schwalby et al. vs. D. S. Stanley et al., a final judgment and decree was rendered in said cause, of which the following is a substantial copy:

MARY U. SCHWALBY ET AL.
vs. } No. 191.
DAVID S. STANLEY ET AL.

On this 12th day of June, A. D. 1893, this cause came on to be heard upon the mandate of the supreme court of Texas, to this court directed, and issued upon the mandate of the Supreme Court of the United States.

56 Thereupon came the plaintiff, Mary U. Schwalby, and her husband, J. A. Schwalby, and the intervenor, Joseph Spence, jr., by

their attorney, Geo. C. Altgelt; the defendant', David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, by their attorney, Henry Terrell; and also came the United States of America by Henry Terrell, assistant district attorney for the United States for the western district of Texas, and submitted the matters in controversy, as well of law as of fact, to the court.

Whereupon, after hearing the pleadings read, the evidence by all parties adduced, and argument of counsel thereon, it was ordered, adjudged, and decreed by the court,

That the intervenor, Joseph Spence, jr., take nothing by his suit, and that he pay the costs by him incurred, for which execution may issue;

That the plaintiff, Mary U. Schwalby, joined by her husband, J. A. Schwalby, do have and recover of and from the defendants, David S. Stanley, William R. Gibson. Samuel T. Cushing, and J. C. Baily, one undivided one-third interest in the following described land, to wit: All that certain tract or parcel of land lying and being in the State of Texas, county of Bexar, city of San Antonio, and being lot number one (1), in block number two (2), being a subdivision of original lot number one (1), in range number four (4), in district number one (1), of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city; said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Friesleben, city surveyor of said city; said lot has a front of thirty-two (32) varas on Grayson street and a depth of ninety (90) varas.

It is further adjudged by the court that the United States of America take nothing by their pleading in this behalf filed, except as hereinafter stated.

It is further adjudged that said plaintiffs do have and recover of and from defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, their costs in this behalf expended, for which let execution issue

It is further ordered, adjudged, and decreed by the court that plain-
tiffs have their writ of possession against the said defendants
57 and all other persons who have entered said premises since the
filing of this suit on the 23rd day of February, 1889, placing them
in joint possession with defendants, subject, however, to the conditions
hereinafter named.

It is considered by the court that the United States of America are entitled to one-third of the value of the improvements made by them in good faith, and that such one-third of the value of said improvements so made by them are worth the sum of three hundred and thirty-three $\frac{33}{100}$ dollars (333.33).

It is considered by the court that the value of the use and occupation of one-third interest in said premises by the defendants amount to one hundred twenty-six dollars $\frac{66}{100}$ (126.66).

It is considered by the court that the value of said one-third interest recovered is eight hundred thirty-three and $\frac{33}{100}$ dollars.

Wherefore it is further adjudged by the court that the United States of America are entitled to recover the excess of the value of such improvements over the value of the use and occupation aforesaid and amounting to two hundred and six $\frac{67}{100}$ dollars ($206.67).

It is accordingly adjudged that no writ of possession shall be issued for the term of one year after the date of this judgment unless said plaintiffs shall pay to the clerk of this court for said United States of America the aforesaid amount of two hundred and six $\frac{67}{100}$ ($206.67) with interest thereon from this day at the rate of six per cent per annum. If the said plaintiffs shall neglect for the term of one year to pay over the amount of said judgment in favor of said United States, with interest thereon as directed and said United States shall within six months after the expiration of said year pay to the clerk of this court for said plaintiff the value of said land, to wit, the sum of eight hundred thirty-three $\frac{33}{100}$ dollars ($833.33) then the said plaintiff shall be forever barred of their writ of possession or from ever having or maintaining any action whatever against said defendants and the United States of America for said land and tenements.

If the said United States of America or their legal representatives shall not within the six months aforesaid pay over to the said clerk for the plaintiffs the said estimated value of the land as hereinbefore directed,
58 then the said plaintiff may sue out their writ of possession as in ordinary cases, free and discharged from the foregoing conditions.

And thereupon all parties, to wit, the plaintiff, the intervenor, the defendants, and the United States of America in open court excepted to the judgment of the court, and gave due notice of appeal.

All parties also requested the court to file its finding of fact and conclusions of law, which motion was by the court granted, each and every party excepting to the judgment aforesaid and findings of fact and conclusions of law, and praying an entry of such exception in the judgment, which is now here done.

That defendants in error, Mary U. Schwalby, and her husband, J. A. Schwalby, reside in Bexar County, Texas, and Joseph Spence, jr., resides in Tom Green County, Texas, and Geo. C. Altgelt, esq., is their attorney.

That defendants in error, David S. Stanley, William R. Gibson, and Samuel T. Cushing reside beyond the limits of the State of Texas, but the exact locality of their residence is to petitioners unknown, and Duval West, esq., is their attorney. That since the rendition of the final judgment aforesaid, Dr. J. C. Bailey has died, leaving as his executrix and sole heir his wife, Mrs. J. C. Bailey, who resides beyond the limits of the State of Texas, but the exact locality of said residence is to petitioners unknown, and Duval West, esq., is her attorney.

Petitioners thus make suggestion of the death of said Dr. J. C. Bailey, and ask that Mrs. J. C. Bailey, executrix as aforesaid, be substituted in his stead as a party defendant in error.

Petitioners further represent that errors have been committed by the said court in rendering the said judgment and duly assigned.

That by reason of said errors petitioners will be deprived of valuable property; and they desire to remove said cause to the court of civil appeals for the fourth supreme judicial district of Texas, at San Antonio, Texas, sitting, that said errors may be corrected and revised.

Petitioners further represent that pending such revision and correction
as aforesaid, they will suffer great wrong and be deprived of their
59 property by the execution of said judgment, and therefore request
that the execution of said judgment be superseded and stayed until the said court of civil appeals and the supreme court of the State of Texas shall have revised and corrected the errors heretofore duly assigned.

Wherefore, premises considered, petitioners pray that writs of error and supersedeas do issue, and that the defendants in error be duly cited according to law to appear and defend said writ before the said court of civil appeals.

F. J. KERNAN and
R. U. CULBERSON,
Attorneys for the United States of America.

SAN ANTONIO, TEXAS, *June 6th*, 1894.

Issuance and service of citation waived, and service and notice of the foregoing petition is hereby accepted.

DUVAL WEST,
Attorney for David S. Stanley, William R. Gibson,
Samuel T. Cushing, and Mrs. J. C. Bailey, executrix
and sole heir of J. C. Baily, dec'd, Defendants in Error.

SAN ANTONIO, TEXAS, *June 6th*, 1894.

Issuance and service of citation waived, and service and notice of the foregoing petition is hereby accepted.

GEO. C. ALTGELT,
Attorney for Mary U. Schwalby, joined by her
husband, J. A. Schwalby, Plaintiff, and for
Intervenor Jas. Spence, jr., Defendants in Error.

(Filed June 7, 1894. Henry Umscheid, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

60 *Supersedeas bond of the United States. Filed June* 17, 1894.

MARY U. SCHWALBY ET AL.
vs. } No. 191.
DAVID S. STANLEY ET AL.

Whereas in the above-numbered and styled cause, pending in the district court of Bexar County, Texas, for the 45th judicial district, and at a regular term of said court on, to wit, the 12th day of June, A. D. 1893, the said Mary U. Schwalby joined by her husband J. A. Schwalby, recovered judgment against David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Baily, and the United States of America, for the title to and possession of an undivided one-third of that certain tract of land situate in the city of San Antonio, Texas, being lot No. 1, in block No. 2, a subdivision of original lot No. 1, in range No. 4, in district No. 1, of the city tract of the city of San Antonio, Texas, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for A. M. Dignowity by G. Friesleben, city surveyor, fronting on Grayson street thirty-two varas and running back ninety varas. And it was also adjudged that intervenor, Joseph Spence, jr., pay all costs of suit incurred by him and that defendants David S. Stanley, William R. Gibson, Samuel T. Cushing and J. C. Baily pay all other costs of suit.

And it was further provided therein that said judgment should not be enforced unless the plaintiffs within one year from date of judgment should pay to the clerk of said court for the United States of America $\$206\frac{67}{100}$ with interest thereon from date of judgment at the rate of six (6) per cent per annum, said sum being the excess of the value of improvements erected on said land by the United States of America over and above the value of the use and occupation aforesaid.

And it was further adjudged therein that the value of said improvements erected on said land by the said United States of America is
$\$333\frac{33}{100}$ and that the value of the use and occupation of said one-
61 third undivided interest by the said United States is $\$126\frac{66}{100}$ and
that the value of the said undivided one-third interest in said tract
and adjudged to said plaintiffs is $\$833\frac{33}{100}$.

From which said judgment the defendant the United States of America have sued out a writ of error to the court of civil appeals for the fourth supreme judicial district of Texas, sitting at San Antonio, Texas, and desire to suspend the execution of said judgment during the pendency of the consideration of said writ of error.

Now, therefore, we, the United States of America as principal and L. H. Coley and R. C. Ware as sureties, acknowledge ourselves bound to pay to Mary U. Schwalby, joined by her husband, J. A. Schwalby, David S. Stanley, William R. Gibson, Samuel T. Cushing, Mrs. J. C. Baily, executrix and sole heir of J. C. Baily, deceased, and Joseph Spence, jr., the sum of five hundred dollars.

Conditioned that the said the United States of America shall prosecute their writ of error with effect and in case the judgment of the said court of civil appeals and the judgment of the supreme court of the State of Texas shall be against them, that they shall perform its or their judgment, sentence or decree and pay all such damages and costs which have accrued in the court below or which may accrue in the said court of civil appeals and in said supreme court, as said courts or either of them may award against them. And they will also pay to the said Mary U. Schwalby, joined by her husband, should said judgment be affirmed, the value of the rent or hire of said land sued for.

Witness our hands and seals this 5th day of June, A. D. 1894.

THE UNITED STATES OF AMERICA, [SEAL.]
By R. U. CULBERSON, *Attorney for the United States.*
L. H. COLEY. [SEAL.]
R. C. WARE. [SEAL.]

(Approved and filed June 7, 1894. Henry Umscheid, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

Defendants' assignment of errors. Filed July 7, 1893.

62 MARY U. SCHWALBY ET AL.
vs. No. 191.
DAVID S. STANLEY ET AL.

Assignment of errors by defendant.

First assignment: The court erred in overruling defendants' first plea in bar, and holding that the United States of America can be sued in the courts of the State of Texas without the consent of the said United States of America.

Second assignment: The court erred in overruling defendants' second plea in bar, and in holding that the property of the United States of America can be subjected to suit in the courts of the State of Texas without the consent of the said United States of America.

Third assignment: The court erred in overruling defendants' third plea in bar, and in holding that notwithstanding the governor of the State of Texas had, pursuant to the act of the legislature of Texas, ceded exclusive jurisdiction to the United States of America over the land in controversy in this suit, that nevertheless the State courts of Texas had jurisdiction to try the title to said land.

A. J. EVANS,
HENRY TERRELL,
Attorneys for Defendants, U. S. Attorneys.

(Filed July 7, 1893. Henry Umscheid, clk. D. C., Bexar Co. By Geo. W. Huntress, deputy.)

Cross assignment of errors by Intervenor Joseph Spence, jr. Filed Aug. 17, 1894.

MARY U. SCHWALBY ET AL. *vs.* DAVID S. STANLEY ET AL.	No. 191. 45th judicial district.

63 Intervenor's cross assignment: The court erred in adjudging that intervenor, Joseph Spence, jr., take nothing by his suit, because he proved the superior title to one-third interest in the land in controversy under the admitted common source of title, and therefore should have been awarded judgment accordingly.

Intervenor's second cross assignment of errors: The court erred in sustaining the plea of the statute of limitations of five years interposed by the United States of America as against intervenor, because the said United States are not included in the statutes of limitations of Texas and the same neither bind nor protect the United States.

Intervenor's third cross assignment: The court erred in sustaining the plea of the statute of limitations of ten years interposed by the United States of America as against intervenor, because the said United States are not included in the statutes of limitations of Texas, and the same neither bind nor protect the United States.

Intervenor prays that the judgment as to him may be reversed, and that this court render such judgment as should have been rendered.

GEO. C. ALTGELT,
Attorney for Intervenor, Joseph Spence, jr.

(Filed August 17, 1894. Henry Umscheid, Clk. D. C. Bexar Co. By J. L. Close, deputy.)

Cross assignment of errors by plaintiffs. Filed Aug. 17, 1894.

MARY U. SCHWALBY ET AL. *vs.* DAVID S. STANLEY ET AL.	No. 191.

Come the plaintiffs, Mary U. Schwalby and J. A. Schwalby,
64 and file this their cross assignment of errors, to wit:

Cross assignment of error by Mary U. Schwalby and J. A. Schwalby, defendants in error:

First cross assignment: The court erred in adjudging to the defendant, the United States of America, the value of improvements claimed to have been made in good faith, because said claim was not sustained by the evidence, for this: that the evidence does not show that the land recovered is actually increased in value anything by reason of said improvements.

Second cross assignment: The court erred in adjudging to appellants (defendants below) the value of any improvements alleged to have been made in good faith, because the evidence fails to prove that the United States were such a possessor in good faith as would entitle them to recover the value of improvements made, for this: that the officers of the United States Government had notice of plaintiff's title, and in placing said improvements upon the land in controversy, acted negligently and in disregard of appellees' rights to them known.

Third cross assignment: The judgment of the court awarding to appellant, the United States of America, the value of improvements to the amount of three hundred thirty-three 33/100 ($333.33) dollars is contrary to the evidence and excessive, for this: that such award includes the value of improvements that are not upon the land adjudged to appellees, but would become valueless if detached from those improvements that are upon the land.

Fourth cross assignment: The court erred in not rendering a general judgment for the plaintiff Mary U. Schwalby against all the defendants for the land sued for with damages for rents.

GEO. C. ALTGELT,
Attorney for plaintiffs, Mary U. Schwalby et al.

(Filed August 17, 1894. Henry Umscheid, clk. D. C., Bexar Co. By J. L. Close, deputy.)

65 *Bill of costs.*

Clerk's fees:

Docketing	.40
Writs and copies	.75
Citation and return	6.00
Taking bond	4.50
Docketing motion or rule	.15
Filing papers	7.35
Entering appearances	.75
" continuances	.60
" orders	3.00
" judgment	1.75
" decree	1.00
Commission to take deposition	1.50
Notice and copies	1.50
Copies of interrogatories	4.50
Subpœnas	1.50
Additional names	.75
Swearing witnesses	.60
Certificates	1.50
Transcripts	87.00
Taxing costs	.25
	$125.35

Bill of costs—Continued.

Sheriff's fees:	
Executing writs	$2.00
Executing citations	6.00
Executing subpœnas	6.00
Jury fees	.50
Mileage	.30
	$14.80
Depositions	5.15

RECAPITULATION.

Clerk's fees	$125.35
Sheriff's fees	14.80
Depositions	5.15
Total	$145.30

Certificate.

THE STATE OF TEXAS,
County of Bexar:

I, Henry Umscheid, clerk of the district courts of Bexar County, do hereby certify that the foregoing eighty-eight (88) pages contain a true and correct transcript of all the orders and proceedings had in a cause
numbered 191 on the civil docket of the district court of the
66 forty-fifth judicial district (within and for the county of Bexar),
wherein Mary U. Schwalby et al. are plaintiffs and David S. Stanley et al. are the defendants.

Witness my hand and seal of said courts at office in the city of San Antonio, on this the 5th day of September, A. D. 1894.

[SEAL.]

HENRY UMSCHEID,
Clk. D. C., Bexar Co.
By GEO. W. HUNTRESS,
Deputy.

(Endorsed:) No. 511. Assignment. The United States, appellants, vs. Mary U. Schwalby et al., appellees. From the district court of Bexar County, 45th judicial district of Texas. Applied for by Duval West, esq., on the 7th day of June, 1894, and delivered to Duval West, esq., on the 5th day of September, 1894. Henry Umscheid, clerk of courts of Bexar County, by Geo. W. Huntress, deputy. Filed in the court of civil appeals for the Fourth supreme judicial district of Texas, at San Antonio, the 5 day of September, 1894. H. E. Hildebrand, clerk, by Mason Williams, deputy.

Opinion and conclusions of law and fact.

THE UNITED STATES ET AL., PLAINTIFFS IN error,
vs.
MARY U. SCHWALBY ET AL., DEFENDANTS in error.
} No. 511. Appeal from Bexar County.

This is an action brought by Mrs. Schwalby, joined by her husband J. A. Schwalby, of trespass, to try title to one-third of lot number one, block

number two, original lot 1, range 4, district 1, San Antonio, Texas, against David S. Syanley and others. Joseph Spence, jr., intervened, claiming title to one-third of the lot. Stanley and the other original defendants, joined
by the United States who made themselves parties, pleaded not guilty,
67 and that Stanley and the other original defendants were officers
in the military service of the United States and were, as such officers, in possession of the land sued for under and by direction of the President and not of their volition or wish, and that neither of them ever pretended to hold or have any right of possession as individuals, and did not claim any title to the land as individuals, but that the property belonged to the United States, and that the suit was a palpable device to maintain an action at law against the United States. The United States specially pleaded their sovereignty and a lack of authority *on* the court to try a case against them; that the governor of Texas had by authority of the State laws vested exclusive jurisdiction over the land in the United States and a State court had no power or authority to make any decree affecting the land. Limitation of three, five, and ten years, and improvements in good faith were also pleaded. Mrs. Schwalby, in a supplemental petition, pleaded coverture in bar of the statutes of limitation. Mrs. Schwalby also excepted to the answer of the United States because they were not parties to the suit, and that there was no authority for them to enter the suit; that the United States had no authority to plead limitation, and that the plea of improvements in good faith was insufficient. The pleas to the jurisdiction and exceptions were all overruled.

The case was tried without a jury, and judgment was rendered against the intervenor and in favor of Mrs. Schwalby for one-third of the land and for $126.66, value of its use and occupation, and in favor of the United States for $333.33, value of improvements made in good faith, the usual form of judgment in such cases being followed.

We find the following facts established by the record:

It was agreed that Anthony M. Dignowity was the common source of title. On September 13th, 1858, said A. M. Dignowity executed to his wife, Amanda J. Dignowity, a general power of attorney authorizing her to sell his real estate, and by virtue of this authority, on May 9th, 1860, Amanda J. Dignowity executed to Duncan B. McMillan a warranty deed to the land in question, which was recorded on October 1st, 1889. Duncan B. McMillan was a married man when the deed was executed, and he
and his wife had five children, two of whom, with the wife, died
68 before he did. He died in February, 1865, leaving surviving three
children—Mrs. Schwalby, Mrs. Neely, and D. W. McMillan. Mrs. Neely died in 1878, leaving two children, who are still living. Mrs. Mary U. Schwalby, one of the defendants in error herein, was married to J. A. Schwalby in January, 1871, and was still married to him when this suit was tried. D. W. McMillan, jr., on March 26th, 1889, conveyed his interest in the lot in controversy to Joseph Spence, who intervened in the suit. The will of Anthony M. Dignowity, dated November 16th, 1870, and probated April 22nd, 1875, bequeathed all his property to Amanda J. Dignowity. On May 1st, 1875, Amanda J. Dignowity executed a deed to the city of San Antonio, conveying all her right, title, and interest to the lot in controversy with a special warranty. On June 16th, 1875, a warranty deed was executed by the city of San Antonio, conveying to the

United States, among other property, lot one in block 2, being the land in controversy. This deed was duly recorded on October 21st, 1875, and in 1881 or 1882 the United States went into possession of the lot by virtue of the deed, and were occupying, using, and enjoying the same up to the time the suit was instituted on February 23rd, 1889. The United States had actual notice that the land had been conveyed by Mrs. Dignowity to Duncan B. McMillan at the time the deed was made to them by the city of San Antonio, and did not make the improvements in good faith. The claim of Joseph Spence was barred by five years' limitation, but Mrs. Schwalby being under the disability of coverture, the statute did not run as to her. On the first trial of this cause judgment was rendered in favor of Mrs. Schwalby and Spence for two-thirds of the land, the United States not having been permitted to take any benefit from the statutes of limitation. The case was then appealed to the supreme court of Texas, where it was held that the United States could not avail themselves of the benefits of statutes of limitation, and they were dismissed from the suit. As to the other parties the judgment was affirmed. (Stanley v. Schwalby, 85 Tex., 348.) On writ of error to the Supreme Court of the United States that judgment was reversed and the cause remanded for another trial. (Stanley v. Schwalby, 147 U. S., 264.)

It is the settled doctrine that neither the United States nor any State can
be sued without their or its consent, except in a limited class of
69 cases provided for in the national Constitution. (The Siren v.
United States, 74 U. S., 7 Wall., 152; Stanley v. Schwalby, 147
U. S., 508; Cunningham v. Railway, 109 U. S., 446.)

It has also been held in the Cu*mm*ingham Case, in the Siren Case, in the Davis Case (10 Wall., 20), and in many others, that "Where property in which the State has an interest comes before the court and under its control in the regular course of judicial administration, without being forcibly taken from the possession of the Government, the court will proceed to discharge its duty in regard to that property. And the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court."

The first and second assignments of error are not well taken. The United States were not sued and neither was it attempted to subject the property of the United States to suit, and neither of these propositions was advanced or held by the district court. Stanley and others were sued individually as trespassers, not as officers of the United States, and the United States voluntarily made themselves parties to the suit. That this suit was properly brought has been decided in a number of cases, and has been reaffirmed in this identical case by the Supreme Court of the United States. (United States v. Lee, 106 U. S., 196; Cunningha' v. Railway Co., 109 U. S., 446.) The jurisdiction of the court is not ousted because the individuals sued assert authority to hold possession of the property as officers of the United States Government. They must show sufficient authority in law to protect them. (Mitchell v. Harmony, 13 How., 115; Baies v. Clark, 95 U. S., 204, and others.) The mere fact that individuals have been placed in possession by the Government would not be a valid defense unless the Government had the lawful authority to so place them. As said by Justice Miller in the Lee Case, "If such be the law of this country it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."

The third assignment of error in as follows: "The court erred in overruling defendant's third plea in bar in holding that notwith-
70 standing the governor of the State of Texas had, pursuant to the act of the legislature of Texas, ceded exclusibe jurisdiction to the United States of America over the land in controversy in this suit, that nevertheless the State courts of Texas had jurisdiction to try the title to said land." . Or, in other words, the contention is that the governor of Texas can, by authority of art. 333, Revised Statutes, cede to the United States jurisdiction over the property of the individual citizen, and that jurisdiction is at once vested in the United States, and the State courts could not entertain jurisdiction. The whole authority of the governor rests upon the hypothesis that the United States has title to the land which he is authorized to proclaim to be within the jurisdiction of the United States. Under the Constitution of the United States exclusive powers of legislation are given over lands purchased by the United States, and without the title being in the United States the State can not cede jurisdiction to them. If the United States had not obtained title to the land the governor could not divest the State of its jurisdiction. The construction contended for would place no limitation upon the power of a governor, and would give such unbridled authority in connection with the lands of the citizen' of this State as was never contemplated by the framers of the Federal Constitution or Texas lawmakers. The cases cited by appellant proceed upon the assumption that title, by purchase, had vested in the United States. (Railway v. Lowe, 114 U. S., 264; United States v. Cornell, 2 Mass., 60.)

The intervenor, Joseph Spence, by three cross assignments insists that he should have recovered a portion of the land in controversy, because the United States are neither bound nor protected by the statute of limitations of the State of Texas. What our opinion may have been, independent of a previous adjudication, as to the right of the United States to plead limitations, can be of no practical value for the reason that on an appeal of this case to the Supreme Court of the United States it was held that the United States, although not bound by statutes of limitation, are entitled to any benefits arising from them. (Stanley v. Schwalby, 147 U. S., 259.)

If the United States are entitled to take the benefits of statutes of
71 limitation, they could not be deprived of the benefits of the five years statute by the fact that they do not pay taxes. They are exempted by statute from the payment of taxes (art. 335, Rev. Stats.), and the object in requiring payment of taxes in order to take under the statute of five years fails as applied to them. It is true that in the case of Moore v. The City of Waco (85 Tex., 206), it is held that the city was bound to allege a compliance with the terms of the statute, including the record of the deed and the payment of taxes, and in the same opinion it is held that a city could acquire title by limitation of five years. This decision was rendered doubtless in view of the fact that all property of municipal corporations is not exempt from taxation, and they should be required to

allege and prove either that the taxes had been paid or that it was a species of property upon which no taxes were laid. We do not think that it was in the contemplation of the court in that case to lay down a rule which would practically prevent anyone holding property exempt from taxation from receiving the benefits derived from the statute of limitations of five years. It has been held that the exemption from taxation of land granted to the International and Great Northern Railway Company was a right that was inherent in the property and followed it into the hands of whomsoever became the owner (Railway v. State, 75 Tex., 356), and the construction contended for by defendants in error would place these owners in the position of not being able to avail themselves of the benefits of the statute of limitation of five years. We are of the opinion that whenever it is settled that a party owning property exempt from taxation has the right to plead this statute that proof of payment of the taxes is furnished by the statute of exemption itself.

That part of the judgment allowing the United States pay for improvements is assailed through cross assignments made by Mrs. Schwalby, because the evidence does not show that the value of the land was increased by the improvements made upon it and for the reason that the evidence fails to show that the improvemnets were made in good faith. The statute does not award the value of the improvements regardless of anything being added by them to the value of the land, but "only the difference
between the value of the land with and its value without the
72 improvements." (Art. 4814 Rev. Stats; Thomas v. Quarles, 64
Tex., 493.) If the improvements had been made in good faith, there is evidence to show that the value of the land was increased by the improvements put upon it, and judgment should have been rendered in favor of the United States for the value of the same. Stanley swore that on his first examination he had placed the value of the lot No. 1, block 2, at $2,500.00, but upon further reflection, judging from the sale of similar contiguous lots made a few days since, that the lot No. 1 in block No. 2 is of the value of $2,000.00, but if the Government had not made the improvements the lot would not be worth $250.00.

We are of the opinion, however, that the United States was not in contemplation of law an innocent purchaser without notice. A. J. Evans, the attorney who represented them in the purchase of the lot from the city of San Antonio, testified that he had information of the sale to Duncan B. McMillan, but had satisfied himself that McMillan had not paid the purchase money. Actual notice was thus brought home to the United States, and it would not matter what the character of the deed may have been, they could not claim to be innocent purchasers. If McMillan had not paid the purchase money, that did not place appellants in any better position as to notice. They had actual notice of his claim, and took the risk in making the improvements.

We are therefore of the opinion that the judgment as to the intervenor, and that decreeing one-third of the land to Mrs. Schwalby, and giving her $126.66 for use and occupation of the premises, should be affirmed, and that the portion of the judgment relating to the improvements should be reversed, and judgment here rendered, granting to Mrs. Schwalby a writ of possession for the land recovered by her, which will be accordingly so done.

(Signed) W. S. FLY, *Associate Justice.*

(Endorsed:) No. 511. In court of civil appeals, fourth supreme judicial district of Texas, San Antonio. The United States et al., plffs. in error, vs. Mary U. Schwalby, et al., defts. in error. Opinion by W. S. Fly, associate justice. Filed in the court of civil appeals at San Antonio, Texas, Nov. 28, 1894. H. E. Hildebrand, clerk.

73 *Judgment of court of civil appeals, Wednesday, November 28th, A. D.* 1894.

THE UNITED STATES, PLTFFS. IN ERROR,
vs.
MARY U. SCHWALBY ET AL., DEFTS. IN ERROR. } No. 511. Error from Bexar County.

This cause came on to be heard on the transcript of the record, and the same being inspected, and it appearing to the court that there is no error in the judgment of the court below except in the allowance to plaintiffs in error for improvements made upon the lands recovered below, it is, therefore, considered, adjudged, and ordered that the judgment of the court below be in all things affirmed except as to such allowance for improvements made, and that the judgment be reformed so as to disallow such improvements made by plaintiffs in error upon the land in controversy; and the court thereupon proceeding to render such judgment as should have been rendered by the court below, doth order, adjudge, and decree: First. That the plaintiff Mary U. Schwalby, joined by her husband, J. A. Schwalby, do have and recover of and from the defendants, David S. Stanley, William R. Gibson, Samuel T. Cushing, and J. C. Baily, an undivided one-third of all that certain tract or parcel of land lying and being in the State of Texas, county of Bexar, city of San Antonio, and being lot number one (1), in block No. two (2), in a subdivision of original lot number one (1), in range number four (4), in district number one (1), of the city tract of the city of San Antonio, on the east side of the San Antonio River, according to the map and survey of said city, said subdivision being according to the plan thereof made for Anthony M. Dignowity by G. Friesleben, surveyor of said city; said lot has a front of thirty-two varas on Grayson street and a depth of ninety varas, and that plaintiffs have their writ of possession against said defendants and all other persons who have entered said premises since the filing of this suit on 23rd day of February, 1889, placing them in joint possession with defendants.

Second. It is further ordered, adjudged, and decreed that said plaintiffs do have and recover of and from said defendants, David S. Stanley, 74 William R. Gibson, Samuel T. Cushing, and J. C. Baily, the sum of one hundred twenty-six and $\frac{66}{100}$ dollars (being the value of the use and occupation of one-third interest in said premises to the date of the trial in the court below), with interest thereon at the rate of six per cent per annum from the 21st day of June, 1893 (the date of the trial in the court below), together with their costs in the court below expended and incurred, for all of which let execution issue.

Third. It is further ordered, adjudged, and decreed that the intervenor, Joseph Spence, jr., take nothing by his suit, and that he pay the costs incurred by him, for which let execution issue.

Fourth. It is furthered ordered, adjudged, and decreed that the plaintiff in error, The United States of America, who voluntarily made itself a party in the court below, take nothing by its plea, and pay all costs of this court and of the court below, for all of which let execution issue against L. H. Coley and R. C. Ware, sureties upon its supersedeas bond, and this decision be certified below for observance.

Motion for rehearing.

Court of civil appeals for the fourth supreme judicial district of Texas, sitting at San Antonio, Texas.

THE UNITED STATES ET AL., PLAINTIFFS in error, *vs.* MARY U. SCHWALBY ET AL., DEFENDANTS in error.	No. 511.

Come the United States of America, plaintiffs in error in the above-styled cause, and make this their application for a rehearing of said cause, and so applying, respectfully represent:

That George C. Altgelt, who resides in the city of San Antonio, Bexar County, Texas, is counsel for Mary U. Schwalby et al., the defendants in error.

That a rehearing of said cause should be granted because of errors committed by said court, as follows:

75 I. The court erred in holding that plaintiffs first assignment of error, viz, "The court erred in overruling defendants' first plea in bar, and in holding that the United States of America can be sued in the courts of the State of Texas without the consent of the said Unitd States of America," was not well taken, because the records show that the principle enunciated was and is applicable to the facts in this case and was violated.

II. The court erred in holding that plaintiffs second assignment of error, viz, "The court erred in overruling defendants second plea in bar, and in holding that the property of the United States of America can be subjected to suit in the courts of the State of Texas without the consent of the said United States of America," was not well taken; because the record shows that the principle enunciated was and is applicable to the facts in this case and was violated.

III. The court erred in overruling plaintiffs third assignment of error and in holding that the courts of the State of Texas had jurisdiction to try title to land over which jurisdiction had been, pursuant to law, duly ceded by the governor of the State of Texas to the United States of America; because by the act of cession the jurisdiction of the State over the property was granted to the said United States exclusively.

IV. The court errred in holding that the United States were not sued without their consent; because the suit was originally brought against Stanley and others, nominal defendants, the United States being the only actual parties defendants, and the facts and record so show.

V. The court erred in holding that the suit was not one against the United States and its property and in holding that no attempt was made to subject the property of the United States to suit; because Stanley and others were not in fact sued as individual trespassers, the United States being the only real parties defendants. All of which is shown by the record and the facts.

VI. The court erred in holding that the United States voluntarily made themselves parties to the suit; because the suit though nominally instituted against Stanley and others was actually brought directly against the United States—the manner of instituting the same being a palpable attempt and device to maintain an action at law against the United States and 76 override fundamental and well-settled principles of law; and because the United States could not be made parties defendants in the absence of an act of Congress authorizing it, not even if the district attorney had instructions to make them a party.

VII. The court erred in holding that the United States were not innocent purchasers without notice and in denying them pay for their improvements; because the court had no jurisdiction or authority to determine or adjudicate the rights of the United States of America in the premises.

VIII. The court erred in undertaking in its judgment to dispose of and conclude the property interests of the United States; because this suit was nominally instituted against individuals.

IX. The court erred in holding that this suit was properly brought and continued against Stanley and others as individual trespassers; because the judgment of the district court, affirmed by this court in this particular, shows that as to an undivided portion of the lot they were rightfully in possession, and hence were lawfully in possession, of the whole lot and not trespassers.

For the errors assigned and reasons set forth, plaintiffs in error pray that a rehearing of said cause be granted them.

R. U. Culberson,
F. J. Kernan,
Attys. for Plaintiffs in Error.

(Endorsed:) Mo. 522. No. 511. The United States, plff. in error, vs. Mary U. Schwalby, et al., deft. in error. Motion for rehearing. Filed in the court of civil appeals at San Antonio, Texas, Dec. 10, 1894. H. E. Hildebrand, clerk. R. U. Culberson, F. J. Kernan, counsel for plff. in error.

Order overruling same.

Wednesday, *January* 16*th*, *A. D.* 1895.

The United States, pltffs. in error, *vs.* Mary U. Schwalby et al., defts. in error. } No. 511. Error from Bexar County.

77 The motion of plaintiffs in error for rehearing, filed December 10th, 1894, coming on to be heard, and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled, and it is further ordered that plaintiffs in error the United States of America and their sureties, L. H. Coley and R. C. Ware, pay all costs of this motion.

Motion of defendant in error for a rehearing.

In the court of civil appeals of Texas, fourth supreme judicial district of Texas.

THE UNITED STATES, ET AL.,
vs. No. 511.
MARY U. SCHWALBY, ET AL.

Now comes the defendant in error, Joseph Spence, jr., and prays the court for a rehearing of this cause upon the following grounds:

1st. Because the court erred in not sustaining the cross assignments of this appellee, and erred in holding that the United States could avail themselves of the statute of limitations and adverse possession of the State of Texas and were entitled to the benefits arising from them.

2nd. Because the court erred in holding that the appellant, the United States, were not required to prove the payment of taxes by them upon the lot in controversy in order to sustain their plea of the statute of limitations of five years, and erred in holding that the exemption from taxation of the property of the United States by the laws of *Taxes* was equivalent to the payment of taxes, wherefore appellee says that the court erred in affirming the judgment as to him.

Defendant in error Spence further shows that R. U. Culberson, esq., and T. J. Kernan, esq., both of whom reside in said county of Bexar, are the attorneys of record of said plaintiff in error, the United States of America, and that Duval West, esq., also residing in said Bexar County, is the attorney of David S. Stanley and other original defendants in the court below.

Defendant in error Spence accordingly prays a rehearing.

GEO. C. ALTGELT,
Atty. for Deft. in Error, Jos. Spence, Jr.

78 Mary U. Schwalby and J. A. Schwalby, defendants in error, accept notice of this motion for rehearing and waive the issuance of notice and copy.

GEO. C. ALTGELT,
Atty. for Mary U. & J. A. Schwalby.

(Endorsed:) Mo. 527. No. 511. The United States et al., pltffs. in error, vs. Mary U. Schwalby et al., defts. in error. Motion of deft. in error, Jos. Spence, jr., for a rehearing. Filed in the court of civil appeals, at San Antonio, Texas, Dec. 12, 1894. H. E. Hildebrand, clerk.

Argument in support of same.

In the court of civil appeals, fourth supreme judicial district, at San Antonio, 1894–1895 term.

UNITED STATES ET AL., PLAINTIFFS IN ERROR,
vs. No. 511.
MARY U. SCHWALBY ET AL., DEFENDANTS IN ERROR.

May it please the court, the defendant in error, Jos. Spence, jr., having heretofore filed his motion for rehearing, asks the leave of the court to present this argument in support of the motion:

This court holds that the Government of the United States could plead the statute of limitations of five years without alleging and proving the payment of taxes, and in reaching this conclusion distinguishes this case from Moore vs. Waco, 85 Tex., 212. This distinction is made upon the theory that not all the property of municipal corporations is exempt from taxation.

The intervenor submits that all property of municipal corporations is thus exempt, and that involved in the Waco case, a public street, is certainly exempt from all taxation.

Sec. 2, art. 8, of the constitution, authorizes the legislature to exempt public property used for public purposes.

Sec. 9, art. XI, of the constitution, goes a step further and
79 actually exempts the property of cities held only for public purposes,
and devoted exclusively to the use and benefit of the public.
A street is certainly such property.

Art. 4673 Rev. Statutes exempts from taxation, 3rd, all property, whether real or personal, belonging exclusively to this State or any political subdivision thereof, or the United States.

Considering these provisions together it is evident that no property of municipal corporations is subject to taxation. It may be true that the legislature has power to repeal the exemption by limiting it to strictly such property as is named in sec. 9, Art. XI. We therefore insist that the court erred in limiting, if not practically overruling, Moore vs. Waco.

At this time all property of municipal corporations is exempt from taxation and the reason given for the distinction has no existence. Apart from this the property involved in the Waco case, a public street, was certainly exempt under the constitution without the aid of the statute, and yet the court held that the payment of taxes must be proved and alleged.

We accordingly pray a reconsideration of this question by the court. Nor can an exemption by the State from taxation of United States property be regarded as a payment. When property of persons is exempted it is to be regarded as an act of grace on the part of the State, but not in the light of a payment.

The exemption of United States property rests upon a different reason. No statute can bind the National Government. It is entirely inconsistent with the sovereignty of the National Government that its property should ever be taxed by State authority.

Defendant in error Spence prays that his motion for rehearing may be granted.

Respectfully submitted.

Geo. C. Altgelt,
Atty. for Defendant in Error, Jos. Spence, jr.

(Endorsed:) No. 511. United States et al. vs. Mary U. Schwalby et al. Argument of Jos. Spence, jr., in support of motion for rehearing. Filed in the court of civil appeals at San Antonio, Texas. Dec. 29, 1894. H. E. Hildebrand, clerk; Geo. C. Altgelt, attorney at law, San Antonio, Texas.

80 *Opinion of court on motions.*

UNITED STATES ET AL., PLTFFS. IN ERROR, v. MARY U. SCHWALBY ET AL., DEFTS. IN ERROR. } No. 511.

On motion for rehearing.

The motions for rehearing made by plaintiffs in error and the intervenor Spence will be overruled. The Supreme Court of the United States has settled every point of any importance in this case, and whatever may have been intended by the supreme court of Texas in the case of Moore v. The City of Waco (85 Tex., 206), we are of the opinion that exemption from taxation would not preclude the owner from successfully setting up the statu's of five years' limitation. The very language of the statute, "paying taxes thereon if any," clearly indicates that when no taxes are payable that proof of payment would not be required. (Art. 3193, Rev. Stats.)

(Signed) W. S. FLY, *Associate Justice.*

(Endorsed:) No. 511. In court of civil appeals, fourth supreme judicial district of Texas, San Antonio. United States et al., pltffs. in error, vs. Mary U. Schwalby et al., defts. in error. Opinion on motions for rehearing by W. S. Fly, associate justice. Filed in the court of civil appeals at San Antonio, Texas, Jan. 16, 1895. H. E. Hildebrand, clerk.

Order overruling same.

WEDNESDAY, *January* 16*th*, *A. D.* 1895.

THE UNITED STATES, PLTFFS. IN ERROR, *vs.* MARY U. SCHWALBY ET. AL., DEFTS. IN ERROR. } No. 511. Error from Bexar County.

The motion of defendant in error, Joseph Spence, jr., for rehearing, filed December 12, 1894, coming on to be heard and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled, and it is further ordered that defendant in error, Joseph Spence, jr., pay all costs of this motion. 81

Judgment of supreme court. # 558.

In supreme court of Texas. Fourth district.

THE U. S. OF AMERICA *vs.* MARY U. SCHWALBY ET AL. }

MARCH 21, 1895.

Opinion delivered by Chief Justice Gaines. (See App. 554 for opinion.)

This day came on hand to be heard the application of Joseph Spence, jr., for a writ of error to the court of civil appeals for the fourth supreme judicial district, and the same having been duly considered, it is ordered that said application be refused; that the applicant, Joseph Spence, jr., intervenor, pay all costs incurred on this application.

I, Chas. S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on the application of Joseph Spence, jr., intervenor, for a writ of error.

Witness my hand and the seal of said court this the 6th day of April, A. D., 1895.

[SEAL.]

CHAS. S. MORSE, *Clerk*.
By , *Deputy*.

(Endorsed :) No. 558. The U. S. of America vs. Mary U. Schwalby et al. Copy of judgment in supreme court. Application for writ of error. Refused. Filed in the court of civil appeals, at San Antonio, Texas, Apr. 8, 1895. H. E. Hildebrand, clerk.

82 *Judgment of supreme court.* # 554.

In supreme court of Texas. Bexar district.

THE U. S. OF AMERICA
vs.
MARY U. SCHWALBY ET AL.

MARCH 21, 1895.

Opinion delivered by Chief Justice Gaines:

This day came on hand to be heard the application of the United States of America for a writ of error to the court of civil appeals for the fourth supreme judicial district, and the same having been duly considered, it is ordered that said application be refused; that the applicant, the United States of America, and its sureties, L. H. Coley and R. C. Ware, pay all costs incurred in this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on the application of the United States of America for a writ of error.

Witness my hand and the seal of said court this the 6th day of April, A. D. 1895.

[SEAL.]

CHAS. S. MORSE, *Clerk*.
By , *Deputy*.

(Endorsed:) No. 554. The U. S. of America vs. Mary U. Schwalby et al. Copy of judgment in supreme court. Application for writ of error. Refused. Filed in the court of civil appeals at San Antonio, Texas, Apr. 8, 1895. H. E. Hildebrand, clerk.

Application for allowance of writ of error.

THE UNITED STATES ET AL., PLAINTIFFS IN ERROR,
vs. No. 511.
MARY U. SCHWALBY ET AL., DEFENDANTS IN ERROR.

83 Court of civil appeals for the fourth supreme judicial district of Texas, sitting at San Antonio, Texas.

Honorable J. H. JAMES,
Chief Justice, Fourth Supreme Judicial District of Texas:

Come the United States of America, plaintiffs in error in the above-styled cause, and make this their application for the allowance of a writ of error from the Supreme Court of the United States to the court of civil appeals for the fourth supreme judicial district of Texas, and so applying, respectfully represent:

That Geo. C. Alygelt, residing in the city of San Antonio, Bexar County, Texas, is attorney for Mary U. Schwalby et al., defendants in error.

That a writ of error as prayed for should be allowed, because on the determination of this cause in your honorable court there were drawn in question the validity of a statute of the United States and an authority exercised under the United States, and the decision of your court was against the validity of the statute and the authority; and because, on the said determination, certain rights, titles, privileges, and immunities were claimed on behalf of the plaintiffs in error under the Constitution and statutes of the United States and under commissions held and authority exercised under the United States, and the decision of your honorable court was against the right, title, privilege, and immunity so claimed.

And whereas the plaintiffs in error have duly made application to the supreme court of the State of Texas for a writ of error in this cause the said application has been denied and the writ refused by said supreme court.

Therefore, the plaintiffs in error pray the allowance of this their application for a writ of error from the United States Supreme Court, there to have the final judgment of your honorable court reexamined and adjudicated in accordance with the provisions of section 709, Revised Statutes of the United States.

R. U. CULBERSON,
F. J. KERNAN,
Attorneys for the United States.

84 (Endorsed:) No. 511. *Mo.* 617. The United States vs. Mary U. Schwalby et al. Application of the United States for allowance of writ of error to the Supreme Court of the United States. Filed in the court of civil appeals at San Antonio, Apr. 9, 1895. H. E. Hildebrand, clerk.

Order overruling same.

THE UNITED STATES, PLTFFS. IN ERROR,
vs.
MARY U. SCHWALBY ET AL., DEFTS. IN ERROR.
No. 511. Error from Bexar County.

WEDNESDAY, *April 10th, A. D.* 1895.

The application of the United States for allowance of writ of error to the Supreme Court of the United States, filed April 9, 1895, coming on to be heard, and the court having duly considered the same, it is ordered that said application be and it is hereby refused; and it is further ordered that applicant, The United States of America, and its sureties, R. C. Ware and L. H. Coley, pay all costs of this application.

Application for writ of error to the Supreme Court of the United States.

To the Honorable EDWARD DOUGLASS WHITE,
Associate Justice of the Supreme Court of the United States:

MARY U. SCHWALBY AND J. A. SCHWALBY,
her husband, plaintiffs,
vs.
DAVID S. STANLEY, WILLIAM R. GIBSON,
Samuel T. Cushing, J. C. Baily, and The
United States of America, defendants.

And now comes David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Baily, and The United States of America, by the Attorney-General, and complain that in the record and proceedings, and also in the rendition of the final judgment in the above-entitled cause, 85 in the court of civil appeals, fourth supreme judicial dist. of Texas, being the highest court of law or equity of the said State of Texas, in which a decision could be had in said suit, and in which a final judgment was rendered against them, the said defendants, on the 28th day of November, 1894, in said suit, wherein the above-named plaintiff had sued and demanded of and from the above-named defendants possession of a certain tract of land, in said record fully described, title whereto was claimed by the United States of America under a certain deed from the city of San Antonio, Texas, to the United States of America, dated the 16th day of June, 1875, and possession whereof was held by the United States, under said deed, and by the officers and soldiers of their Army, from the date of said deed hitherto. The said defendants, Stanley, Gibson, Cushing, and Baily, being officers in the Army of the United States, and occupants of said land, as such officers, under the possession of the United States of America, by direction of the President of the United States of America, the Commander in Chief of the Army and Navy of the United States, and not of their own volition or act, neither of said defendants pretending or claiming to hold or have possession thereof personally, or in their own right.

The United States of America appeared by their attorney, A. J. Evans, United States attorney, by direction of the Attorney-General, and plead to the jurisdiction of the court and also to the merits of the action.

The court, however, rendered judgment against all the defendants.

A transcript of the record accompanies this petition and discloses the fact, that a Federal question was involved and decided by the court in the judgment complained of.

Assignments of error.

I.

The court erred in overruling defendants' first plea in bar and in holding that the United States of America can be sued in the courts of Texas without the consent of the United States of America.

II.

The court erred in overruling defendants' second plea in bar and in holding that the property of the United States can be subjected to 86 suit in the courts of the State of Texas without the consent of the United States of America.

III.

The court erred in overruling defendants' third plea in bar and holding that, notwithstanding that the governor of the State of Texas had, pursuant to the act of the legislature of Texas, ceded exclusive jurisdiction to the United States of America over the land in controversy in this suit, nevertheless, the State courts of Texas had jurisdiction to try and determine the title to said land.

IV.

The court erred in holding that the defendants, who occupied the land under no claim of title or right of possession in themselves, but only as officers and agents of the United States of America, acting under orders and authority from their superior officers, were liable to the process and subject to the jurisdiction of the State courts of Texas, when it appeared, as in fact it did, that the possession was held under the authority of the Constitution and laws of the United States, and that good and complete title was vested in the United States of America by a valid deed from the city of San Antonio, Texas.

All which appears in the record and proceedings in said suit, a transcript whereof is herewith presented; and that manifest error hath happened to the great damage of petitioners.

Wherefore, petitioners pray for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

(Signed) HOLMES CONRAD,
Acting Atty. General.

(Endorsed:) Filed in the court of civil appeals at San Antonio, Texas, Jun' 19, 1895. H. E. Hildebrand, clerk.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the court of civil appeals for the fourth supreme judicial district of the State of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mary U. Schwalby and J. A. Schwalby, her husband, plaintiffs, and David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Baily, and the United States of America, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected,
88 the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of June, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) Filed in the court of civil appeals at San Antonio, Texas, Jun' 17, 1895. H. E. Hildebrand, clerk.

UNITED STATES OF AMERICA, *ss:*

To Mary U. Schwalby and J. A. Schwalby, her husband, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the fourth supreme judicial district of the State of Texas, wherein David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Baily, and the United States of America are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this sixth day of June, in
89 the year of our Lord one thousand eight hundred and ninety-five.

E. D. White,
Associate Justice of the Supreme Court of the United States.

San Antonio, Texas, *June* 13, 1895.

Come now Mary U. Schwalby and J. A. Schwalby, her husband, defendants in error, through their attorneys of record, George C. Altgelt, and hereby acknowledge service of the within and foregoing cit*it*ation in error.

Geo. C. Altgelt,
Att'y of Record for Mary U. Schwalby and J. A. Schwalby.

(Endorsed:) Filed in the court of civil appeals at San Antonio, Texas, Jun' 17, 1895. H. E. Hildebrand, clerk.

90 *Certificate of clerk.*

I, H. E. Hildebrand, clerk of the court of civil appeals of the fourth supreme judicial district of Texas, do hereby certify that the foregoing 89 pages contain a true and correct copy of the following papers in Cause No. 511, United States, appellant, vs. Mary U. Schwalby, appellee, to wit:

1. Transcript from lower court.
2. Opinion and conclusions of law and fact.
3. Judgment of court of civil appeals.
4. Motion of United States for rehearing.
5. Order overruling same.
6. Motion of Joseph Spence for rehearing.
7. Argument in support of same.
8. Opinion of court on motions for rehearing.
9. Order overruling motion for rehearing by Joseph Spence.
10. Judgment of supreme court of Texas refusing application of Joseph Spence for writ of error.
11. Judgment of supreme court of Texas refusing application of United States for writ of error.
12. Application for allowance of writ of error to Supreme Court of United States.
13. Order overruling same.
14. Application to Associate Justice White for writ of error.
15. Writ of error from Supreme Court of United States.
16. Citation in error from Supreme Court of United States.

In testimony whereof I hereunto set my hand, with the impress of the seal of said court, this the 24th day of June, A. D. 1895.

[SEAL.] H. E. Hildebrand,
Clerk Court of Civil Appeals,
4th Supreme Judicial District of Texas.

(Indorsed:) No. . Fourth district of Texas. The United States, appellant, pltffs. in error, vs. Mary U. Schwalby et al., appellee, defts. in error. From Bexar County. Transcript from the court of civil appeals at San Antonio. Filed in Supreme Court of U. S. at Washington, D. C., the day of , A. D. 189 . , clerk. By , deputy.

(Indorsed on cover:) Case No. 15943. Term No., 653. David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Baily, and the United States, plaintiffs in error, vs. Mary U. Schwalby, and J. A. Schwalby, her husband. Texas. Court of civil appeals, 4th judicial district. Filed July 2nd, 1895.

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Office Supreme Court U. S.
FILED.
OCT 22 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1895.

David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Bailey, and The United States, plaintiffs in error,
v.
Mary U. Schwalby and J. A. Schwalby, her husband.

No. 653.

IN ERROR TO COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR THE UNITED STATES.

Supreme Court of the United States.

OCTOBER TERM, 1895.

DAVID S. STANLEY, WILLIAM R. GIBSON, Samuel T. Cushing, J. C. Bailey, and The United States, plaintiffs in error, *v.* MARY U. SCHWALBY AND J. A. SCHWALBY, her husband.	No. 653.

IN ERROR TO COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF FOR THE UNITED STATES.

This case is here on writ of error to the court of civil appeals for the fourth supreme judicial district of the State of Texas, to correct a judgment rendered by said court on November 28, 1894, in favor of the defendants in error here, Mary U. Schwalby and J. A. Schwalby, her husband, and against the plaintiffs in error here, who, with the exception of the United States, were in possession of the land in the proceedings mentioned, as officers in the Army of the United States.

THE CASE.

All of the facts upon which the judgment complained of was rendered will be found in the "Statement of facts" (Rec., pp. 22–34), from which it appears that on the 1st day of May, 1875, Amanda J. Dignowity, in her own right, and as independent executrix of the last will and testament of Anthony M. Dignowity, deceased, conveyed to the city of San Antonio, Tex., certain lots of land in fee simple. And the land in this proceeding mentioned was also therein conveyed as follows:

> Also to release and quitclaim to said city of San Antonio all my right, title, and interest in lot No. 1, in same block, No. 2, known as the McMillan lot. Also all my right, title, and interest to said block No. 2, to have and to hold, all and singular, the premises above mentioned, with the rights, members, hereditaments to the same belonging or in anywise incident or pertaining unto the said city of San Antonio and its assigns forever. And I hereby bind myself as a party to this instrument, and so far as I am executrix, as aforesaid, and by law authorized, bind all the heirs, devisees, legatees, distributees, and personal representatives of said estate, to warrant and forever defend, all and singular, the said premises unto the said city of San Antonio and its assigns against any person whomsoever, lawfully claiming, or to claim the same, or any part thereof, by, in, or through Anthony M. Dignowity, deceased, or the estate of said Dignowity, deceased, and none other. * * *

The consideration of the above deed was $1,500, and the deed was duly recorded in the proper office on the 1st of June, 1875.

By deed dated 16th June, 1875, the city of San Antonio conveyed to the Government of the United States of America many lots of ground for military purposes, among them lot No. 1 in block No. 2, embraced in the deed above described (pp. 27–28).

The United States first took possession of this lot in the year 1875 or 1876; it was then open prairie. And between the years 1881 and 1889, when this suit was commenced, they had made improvements thereon which are worth about $2,500. (Rec., p. 25.)

On 23d of February, 1889, the defendants in error here, Schwalby and husband, filed their original petition, and on December 2, 1889, their amended petition, against Stanley, Gibson, Cushing, and Bailey, plaintiffs in error here, in an action of trespass to try title.

Petitioners charged that Mary U. Schwalby was, on the 1st of February, 1889, lawfully seized and possessed of an undivided one-third interest in said lot No. 1 in block No. 2, in the city of San Antonio; that she holds the same in fee simple and is entitled to possession of the whole of said property. That defendants had, on the 2d of February, 1889, unlawfully entered upon and dispossessed petitioners of said premises and withhold from them the possession thereof.

Answers are filed by the defendants and also by the United States, who appear by Andrew J. Evans, United States attorney for the western district of Texas, who appears for the United States by direction of the Attorney-General, and exhibits, with the answer, copies of the letters authorizing his appearance.

Before filing their answers the defendants had tendered certain pleas to the jurisdiction of the court; of the statutes of limitation; that they were purchasers for value without notice, and in bar of the action.

The supreme court of Texas having denied the right of the attorney-general to make the United States a party to this proceeding, and having also decided that because the United States are not bound by the State statutes of limitation, that, therefore, the bar of such statutes could not be interposed by the United States. This court, on error to the supreme court of the State of Texas, reversed said judgment, for reasons stated in the opinion. (*Stanley* v. *Schwalby*, 147 U. S., 508.)

The basis of the claim asserted by petitioners was a deed, with general warranty from Anthony M. Dignowity by Amanda J. Dignowity, dated May 9, 1860, to Duncan B. McMillan, "duly acknowledged before W. H. Cleveland, notary public, Bexar County, Texas, and again duly acknowledged on December 10, 1889, before W. H. Houston, notary public, Bexar County, Texas."

This deed appears to have been made by Amanda J. Dignowity under a power of attorney from her husband, dated September 15, 1858, and recorded in Bexar County November 16, 1858, "granting to her full power to convey real estate and to deliver deeds therefor."

It appears that Duncan B. McMillan and his wife had five children, to wit, Mary Uran (the petitioner here), born September 11, 1848; Duncan Wynn McMillan, born November 2, 1850; Saint McMillan, born October 12, 1852; Sarah McMillan, born August 3, 1854; Teressa McMillan, born April 6, 1857.

Duncan B. McMillan died February 5, 1865. His wife died July 4, 1860.

Only three of the children survived the father, to wit, Mary Uran, the petitioner; Sarah, who married J. A. Neely, and D. W. McMillan, who conveyed his interest in the property to Joseph Spence, jr., by deed made and acknowledged March 26, 1889, and recorded March 29, 1889.

Anthony M. Dignowity died April, 1875, testate, having by his will devised all of his real estate to his widow.

Possession of the land was never delivered to or taken by McMillan, nor is there any evidence that the deed was ever delivered to him.

The taxes on the lot were paid by Dignowity from 1860 to 1875.

By the judgment complained of it was decided that the petitioners were entitled to recover from the defendants one-third of lot No. 1 in block No. 2, and $126.66 for use and occupation of such one-third interest; that Joseph Spence, jr., who had intervened by petition and asserted title, under conveyance from Duncan W. McMillan, took nothing by his suit; that the United States of America, having voluntarily made itself a party in the court below, should take nothing by its plea, but should pay all the costs (p. 48).

ARGUMENT.

THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT THE CLAIM OF THE PETITIONERS AND DEFEAT THE TITLE OF THE UNITED STATES.

It may be true, as testified to by Mrs. Dignowity, that she had executed this deed to McMillan, under the power of attorney from her husband, but it is not true, so far as this record discloses, that such deed was ever *delivered* by her to McMillan; that the sale which it purported to evidence was ever consummated; that he ever paid for this land; that possession was ever delivered to him, or that he ever claimed to own it or attempted to exercise any acts of ownership over it.

Petitioners took the deposition of Mrs. Dignowity on the 23d of July, 1889, but did not offer it in evidence. In that deposition Mrs. Dignowity states as her reason for executing only a quitclaim deed to the city of San Antonio that it was the habit of her husband in his lifetime whenever he sold a city lot to mark the name of the purchaser *in pencil* on the map, and when the lot was paid for to write the name *in ink*. She said:

> I presume I found this lot marked in the name of McMillan in pencil, and therefore called it the McMillan lot. This is the only explanation I am now able to give (p. 28). Neither Duncan B. McMillan, nor anyone for him, nor any of his heirs, ever claimed an interest in the lot in suit in this case from 1860 to 1875 (the date of the conveyance to the United States).

On December 31, 1889, Mrs. Dignowity again gave her deposition on behalf of the defendants to the petition, and testified—

> of a Mr. D. McMillan coming to my house with his wife. I saw him only once, and that was during the early part of the Confederate war; he was returning to his home in Louisiana. I have seen the original of the deed from me to D. B. McMillan, dated May 9, 1860, and made under a power of attorney given to

> me by Anthony M. Dignowity and have sworn to my signature and know it to have been executed at that time. I was shown the deed by Capt. William Houston. * * * I have never seen it but that one time since it was executed by me until to-day. I carefully examined it, and it is a genuine deed.
>
> I do not know why said deed was never recorded until a few months ago. I don't know whether I ever delivered possession of the lot in controversy to Duncan B. McMillan, or his agent for him, formally or not. I paid taxes on the land until it was sold subsequently. I don't remember of receiving but $50 on the transaction, and think that was paid before the date of the deed. I don't recollect anything more than that I was paid $50 on the trade. And I executed the deed and acknowledged it before Mr. Cleveland, and left it with him.
>
> * * * * *
>
> I do remember W. H. Cleveland. He was a lawyer in good standing about the year 1860. He did at times attend to business both for myself and husband (p. 30).

George C. Altgelt testifies (p. 32):

> I am plaintiff's attorney. I do not know Mrs. Mary U. Schwalby personally. I received the deed to Duncan B. McMillan from Amanda J. Dignowity, attorney in fact for Anthony M. Dignowity, *by mail.* It was sent to me by Joseph Spence, jr., who is a lawyer and land agent of San Angelo, Tom Green County, Tex. I never saw Mrs. Schwalby (p. 32).

Now, Mr. Altgelt is the attorney for Mrs. Schwalby. His name alone authenticates her petition in this case. He does not know her and never saw her.

The deed which Mrs. Dignowity testifies was executed and acknowledged by her was left by her in the hands of Mr. Cleveland, who attended to the business of herself and her husband. From the day she left it in his hands she never saw it until the 10th of December, 1889, when it was shown to her by Captain Houston.

It appears, on page 23, that on the 10th of December, 1889, she reacknowledged the deed before Captain Houston. The deed reaches the hands of Mr. Altgelt through the mail from Joseph Spence, jr., lawyer and land agent.

Joseph Spence, jr., is the gentleman who intervened by petition in this case, through George C. Altgelt, as his attorney (pp. 3 and 4), and claims to be the owner of one-third of this lot of ground by a deed from Duncan W. McMillan (p. 25).

Duncan W. McMillan appears as a witness in this case by deposition (pp. 30–31). A deposition taken on behalf of the petitioner and her brother, the intervener, but not read by them, and in which he was not interrogated either as to the deed to his father or as to his sale to Joseph Spence, jr.

Now, this is all the testimony bearing on the question of the conveyance of title to D. B. McMillan, and it affords no ground for even a suspicion that the deed which Mrs. Dignowity left in the hands of her attorney, Cleveland, was ever delivered by her, or by her authority, to Mr. Joseph Spence, or to Mr. George C. Altgelt, or to anyone else.

This deed was made in 1860, on May 9, one year before the civil war broke out.

McMillan died in February, 1865, but three children survived him. Two of them testify as to having heard him speak of a lot of ground in San Antonio, and yet from 1865 to 1889 no attempt is made by either of these children to investigate or prosecute this claim. The deed to their father is never produced; it comes to light twenty-nine years after it was made, twenty-four years after the grantee's death; is produced then in a transaction between a land agent and a lawyer, the land agent appearing as the claimant of one-third of the property by purchase from McMillan's son, and the lawyer appearing as counsel for McMillan's daughter, whom he did not know and had never seen.

The presence of these facts, with the absence of all evidence tending to show a delivery of the deed, impart to this claim a very bad odor; and this with its staleness calls for strictness and fullness of proof.

NO NOTICE TO THE UNITED STATES OF M'MILLAN'S TITLE OR INTEREST.

> It is a sufficient answer in all cases to the allegation of notice to show that the party to be affected by it could not have obtained the necessary information by an investigation conducted in the usual course of business. And where circumstances are brought home to the knowledge of the party, which were of themselves sufficient to put him upon inquiry and thus amount to notice, he may rebut the presumption of notice, which would otherwise arise, by showing the existence of other attendant circumstances sufficient to satisfy a prudent person that further

inquiry was unnecessary. (2 Sayles' Real Estate Laws of Texas, art. 1077; *Wilson* v. *Williams*, 25 Tex., 54.)

The only medium through which notice was conveyed to the United States was the United States district attorney, Mr. Evans, who testifies (pp. 31–32) that he made an examination of the title to the lot in controversy; examined the record of deeds for Bexar County, Tex.; found no deed of record from Dignowity; believed the title good, and so advised the Department at Washington, and on his advice the Government took the deed from the city in good faith. He says (p. 32):

> I saw the deed from Mrs. Dignowity, as executrix, etc., to the city of San Antonio; read it, and had notice of all its recitals. I had information of the sale to Duncan B. McMillan, but I satisfied myself that he had never paid the purchase money.

This witness had information of the *sale* to Duncan B. McMillan, not of the *deed* from Mrs. Dignowity to McMillan. The sale, if any, had been made fifteen years before this witness was called upon to examine the title. That the lot was referred to as the "McMillan lot" doubtless was the fact that directed his attention and inquiry to the sale. But assume that in the course of his inquiry he had not only heard of the sale but had actually seen the deed. Of what and to what extent would these facts have affected him—and through him the United States—with notice? The notice must have been of some subsisting, prior, paramount title or claim in or to the property. A deed in the hands of the grantee would have been sufficient notice of such title, or a deed upon the public records, or a person in possession, claiming ownership, or under an adverse title.

But none of these conditions existed here. A sale was heard of as having occurred fifteen years before. No person then, or at any previous time, had ever appeared claiming under such sale. There was no one in possession of the land claiming by virtue of such sale. And the deed, if the agent of the United States ever saw it at all, was not in the hands of the grantee, or those claiming under him. It does not appear from this record that that deed was ever seen by anyone from 1860 to 1889.

Now, an unrecorded deed in the hands of a third person would not impart notice of the title it purported to convey. If it be said, however, that these facts brought to the attention of the agent of the United States were sufficient to have put him upon inquiry, of whom and in what direction would such inquiries have been made?

The deed from Amanda J. Dignowity, in her own right and as executrix of her husband, was a quitclaim deed, and—

> It is the settled law of this State (Texas) that a party receiving a quitclaim deed is not a bona fide purchaser without notice of any greater interest therein than his grantor had at the date of the execution of the deed. (Sayles Real Est. Laws of Texas, art. 1075; art. 847.)

That deed was made to the city of San Antonio on May 1, 1875, and the deed from the city of San Antonio to the United States was made on the 16th of June, 1875 (p. 26).

Mrs. Dignowity has explained that her reason for making a quitclaim deed was, that the lot was marked on the map "McMillan lot."

> I must have known in some way that the lot had been sold and a payment made on it, and I know of no other way I should have known it except as stated above.

On the 23d of July, 1889, Mrs. Dignowity testified:

> I never knew Duncan B. McMillan; or if I did I have no recollection of him. If I ever had any business transactions with him I have entirely forgotten them. I may have, in the year 1860, had business with Duncan B. McMillan relating to the sale to him of a lot of land in San Antonio, but if so I have entirely forgotten it. I have no recollection of ever making a deed to Duncan B. McMillan of lot 1 in block 2, etc., though I may have done so. If such a deed was made by me thirty-nine years ago, I do not see why it was not recorded, unless, perhaps, the full purchase money had not been paid.

On the 31st of December, 1889, when examined again on the subject, she said:

> When I gave my deposition to Captain Houston last summer I stated then that I never knew a man by the name of Duncan B. McMillan, but the questions then propounded to me put me to thinking, and I afterwards recollected, and from some old papers my memory was refreshed on the subject, so that now I answer of a Mr. D. McMillan coming to my house with his wife. I saw him only once and that was during the early part of the Confederate war. He was returning to his home in Louisiana.

So that an inquiry from the United States to Mrs. Dignowity would have elicited only the reply made by her in July, 1889, that she never knew McMillan or made him a deed, or if she had, had forgotten it.

In what other direction could inquiries have been made? Who knew where McMillan lived? Whether he was living or dead? Who his descendants, if any, were? Mrs. Schwalby, the petitioner here, testifies in her deposition (p. 23) that she is 40 years old, and lives near Iola, in Grimes County, Tex. That her brother, D. W. McMillan, lives at or near Devine, Medina County, Tex.

Whether they lived in Texas, or where they lived in June, 1875, does not appear. And it is not pretended that their residence or existence was known to or could have been ascertained by the United States in 1875 by the exercise of any degree of diligence.

These claimants had no known agent or attorney, and no course of inquiry can be suggested which would have led the agent of the United States to a knowledge of the claim that is here presented.

Though it be true that Mrs. Dignowity, for the reason stated by her, executed to the city of San Antonio only a quitclaim deed, and such deed may have operated as a warning to the grantee therein of some outstanding claim upon the property conveyed, yet such notice can not be imputed to the United States, who took from the city of San Antonio, under a deed of bargain and sale, a general warranty of title.

In *United States* v. *California, etc., Land Company* (148 U. S., 47) this court in considering the effect of quitclaim deeds, as notice to subsequent purchasers, said:

> Now, even in those courts in which the rule was announced that one who takes under a quitclaim deed can not be a *bona fide* purchaser, it was sometimes limited to the grantee in such a deed and not extended to those cases in which a quitclaim was only a prior conveyance in the chain of title. * * * And this is certainly a most reasonable limitation, because the rule is obviously, at the best, arbitrary and technical. * * * It would be unfortunate, in view of the fact that in so many chains of title there are found quitclaim deeds, to extend a purely arbitrary rule so as to make the fact of such a deed notice of of any prior defect in the title.

PETITIONERS HAD NO RIGHT OF ACTION IN TRESPASS TO TRY TITLE AGAINST THE UNITED STATES, BECAUSE, AS APPEARS BY THE JUDGMENT COMPLAINED OF, THE UNITED STATES AND THE PETITIONER WERE TENANTS IN COMMON OF THIS LAND.

Duncan B. McMillan, the alleged purchaser, left surviving him three children, who were his sole heirs at law, to wit: Mrs. Schwalby, the petitioner; Mrs. Sarah Neely, and Duncan W. McMillan (p. 23). The latter had by deed of March 26, 1889, conveyed his one-third interest to Joseph Spence, jr. (p. 25), who by his petition filed in this cause December 2, 1889, intervened and asserted his claim.

It appears from the "Statement of facts" (p. 22) that the plaintiff and the intervener offered their evidence jointly.

To the claims asserted by these persons the United States, by proper pleading, opposed the bar of the several statutes of limitation. To this Mrs. Schwalby set up the disability of her coverture, and Mr. Joseph Spence relied on the view that as the United States were not subject to the bar of a statute of limitations, they could not avail themselves of that bar in their defense. But, as we have already seen, this court did not concur with Mr. Joseph Spence in that view. (*Stanley* v. *Schwalby*, 147 U. S., 508.)

In the judgment complained of it was decided, that Mrs. Schwalby's coverture protected her from the operation of the statutes of limitation, and judgment accordingly was given in her favor for the one-third claimed by her. But it was also decided that the claim asserted by Joseph Spence was barred by five years' limitation, and judgment was accordingly rendered against him on his claim.

Now, it is expressly provided by the Texas statutes that—

> Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the persons having such peaceable and adverse possession shall be held to have full title precluding all claims. (Sayles Texas Civil Statutes, art. 3196; *Spofford* v. *Bennett*, 55 Tex., 293; *Craig* v. *Cartwright*, 65 Tex., 413.)

So the fact was ascertained by the judgment complained of, and while Mrs. Schwalby was the owner of one-third of this lot the United States was the owner of another third of it, and so was a tenant in common with Mrs. Schwalby.

The United States had never ousted Mrs. Schwalby of her possession. There is no proof whatever in this record of any demand having ever been made by her upon the United States for possession and a refusal by them of such demand.

Tenants in common have equal right of possession of every part and parcel of the subject-matter of the tenancy. It is the characteristic of a tenancy in common that there be unity of right of possession. Accordingly, one tenant in common can not maintain against his cotenant an action of trespass to try title except the unity of possession be first broken by an ouster.

> "Trespass lies not by one tenant in common against another tenant in common." Except, perhaps, in two contingencies. The first is where there has been something which the court feels authorized by the rules of law to treat as an ouster. The second is where there has been some act which the court is authorized to treat as a destruction of the common property. (*Freeman on Cotenancy and Partition*, 2d ed., sec. 298.)
>
> Ouster has been defined as an actual turning out or keeping excluded the party entitled to the possession of any real property corporeal. (Bouvier's Law Dict., title "Ouster.")
>
> It does not arise from a mere denial of the plaintiff's title. (*Filbert* v. *Hoff*, 42 Penna. St., 99; *Freeman on Cotenancy*, sec. 301.)

When it was ascertained by the judgment of the court that the United States had acquired title to the one-third interest formerly owned by D. W. McMillan, and had thereby become a cotenant with Mrs. Schwalby, the plaintiff here should have been put to her remedy by a bill for partition.

THE STATUTE OF LIMITATIONS.

> If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be, at the time such title shall first descend, or the adverse possession commence * * * a married woman * * * the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit or the making of such defense. (Sayles' Texas Civil Statutes, art. 3201.)
>
> All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards, by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife; but during the marriage the husband shall have the sole management of all such property. (*Ibid.*, art. 285.)

It appears here that Mary U. Schwalby, the petitioner, was born on the 11th of September, 1848; she became of age, then, on the 11th day of September, 1869.

Duncan B. McMillan, her father, died on the 5th of February, 1865. His real estate immediately passed to his heirs at law.

So that Mrs. Schwalby's right of action for the recovery of this land accrued to her as early as the 12th day of September, 1869; and the right which so accrued continued without interruption, unless her coverture, which occurred on the 18th of January, 1871, can be said to have interrupted it (p. 23).

It is not denied that the possession of this land has not at any time been in Duncan B. McMillan or anyone claiming under him, but has at all times been in Anthony M. Dignowity and those claiming under him. If the right of possession was ever in Duncan B. McMillan it passed to Mary U. Schwalby, the plaintiff here, and to her coheirs, on the 5th of February, 1865, when their father died. The right of action to recover such possession passed then to these heirs, and on the 11th of September, 1869, when the plaintiff here became of age, she was in position to assert that right by the appropriate action in the courts.

The statute of limitations commenced to run against her on the 12th day of September, 1869, and having commenced to run no subsequent disability of hers would stop its running.

In *Doe* v. *Jones* (4 T. Rep., 300) Lord Kenyon said:

> I confess I never heard it doubted, till the discussion of this case, whether, when any of the statutes of limitation had begun to run, a subsequent disability would stop their running.

In *McDonald* v. *Hovey* (110 U. S., 620) Mr. Justice Bradley, speaking for the court, reviews the English and American statutes of limitation and the decisions of the courts thereon, including that of the supreme court of Texas in *White* v. *Lattimer* (12 Tex., 61), and approves—

> the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it.

This would seem to be conclusive of the question raised upon the coverture of the plaintiff here as arresting the course of the statute of limitations.

It may, however, be further suggested that while the Texas statute is very broad in its terms referring to "married women," and contains no express exception or qualification as to its application, yet in its other provisions in relation to the rights of married women it would seem that the reason of the rule has no sort of application to those rights in relation to their separate estates.

Article 1204, Sayles Texas Civil Statutes, provides:

> The husband may sue, either alone or jointly with his wife, for the recovery of any separate property of the wife. And in case he fail or neglect so to do, she may, by the authority of the court, sue for such property in her own name.

There is no other provision of the statute authorizing the wife to sue alone in the lifetime of her husband for the recovery of her separate property.

The right of action then appears to be a joint right in both husband and wife, the wife being permitted to sue alone only "by the authority of the court, in case the husband fail or neglect so to do."

But here the husband and wife have sued jointly, and there is no pretense that the husband was under any disability which could suspend the operation of the statute of limitations. Indeed, the husband had a right of action here in himself alone, under the statute. Is it possible that he can, by joining his wife with him in the action, claim the protection of her alleged disability of coverture?

The wife was a married woman certainly. But if a right of action was in her, if she could sue at her own will for the recovery of her separate property, then she was under no disability.

(See *Hallett* v. *Hastings*, 35 Chan. Div., p. —; *Lowe* v. *Fox*, 15 Q. B. Div., 667; *Cameron* v. *Smith*, 50 Cal., 303.)

THIS SUIT WAS AGAINST THE UNITED STATES AND AGAINST THE PROPERTY OF THE UNITED STATES; AND CONSEQUENTLY COULD NOT BE MAINTAINED, AND SHOULD HAVE BEEN DISMISSED.

To be sure the court could not have dismissed the action upon the mere suggestion by the defendants that the land sued for was the property of the United States, without inquiring into the truth of the suggestion; but after a judicial inquiry had made it clear that the property, or an undivided interest therein, did belong to the United States, then the court was without jurisdiction to proceed further, and to decide any question arising in the cause between the plaintiff on the one hand and the United States, who had become defendants, on the other.

Here, as we have already seen, the court by its final judgment ascertained and determined that one full, undivided third interest in this lot was the property of the United States.

Mary Schwalby, the plaintiff, and Duncan W. McMillan, her brother, the intervenor, had made common cause in this action against the United States, through its agents, the army officers, who were in occupation of the land.

The court decided in favor of Mary as to her third; but it also decided in favor of the United States as to the third claimed by Joseph Spence, the assignee of Duncan W.

Now, the fact that the United States was the owner of this one-third became apparent to the court before the rendition of its judgment; and the law which forbade the court to make a decree in partition in an action of trespass to try title may be presumed to have been equally well known to the court.

So, in any view, it is obvious that when the court ascertained the interest which the United States had in this property its power to adjudicate with reference to such interest ceased.

HOLMES CONRAD,
Solicitor-General.

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In the Supreme Court of the United States.

October Term, 1895.

David S. Stanley, William R. Gibson, Samuel T. Cushing, J. C. Baily, and The United States, plaintiffs in error,
v.
Mary U. Schwalby and J. A. Schwalby, her husband.

No. 653.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DAVID S. STANLEY, WILLIAM R. GIBSON, Samuel T. Cushing, J. C. Baily, and The United States, plaintiffs in error,
v.
MARY U. SCHWALBY AND J. A. SCHWALBY, her husband.
} No. 653.

MOTION TO ADVANCE.

This is a writ of error to review a judgment of the court of civil appeals for the fourth supreme judicial district of Texas (the supreme court of Texas having refused to grant a writ of error in said cause) affirming a judgment of the district court of Bexar County, Tex. The suit is an action in trespass brought by Mary U. Schwalby (her husband, J. A. Schwalby, being subsequently made a party) against David S. Stanley and others, United States officers, to try title to a certain lot of land in San Antonio, Tex., occupied by the United States as part of a military reservation. The case has once before had the attention of this court. (147 U. S., 508.)

The Solicitor-General, on behalf of the plaintiffs in error, respectfully moves the court, in accordance with rule 26, section 4, to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the counsel for the defendants in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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